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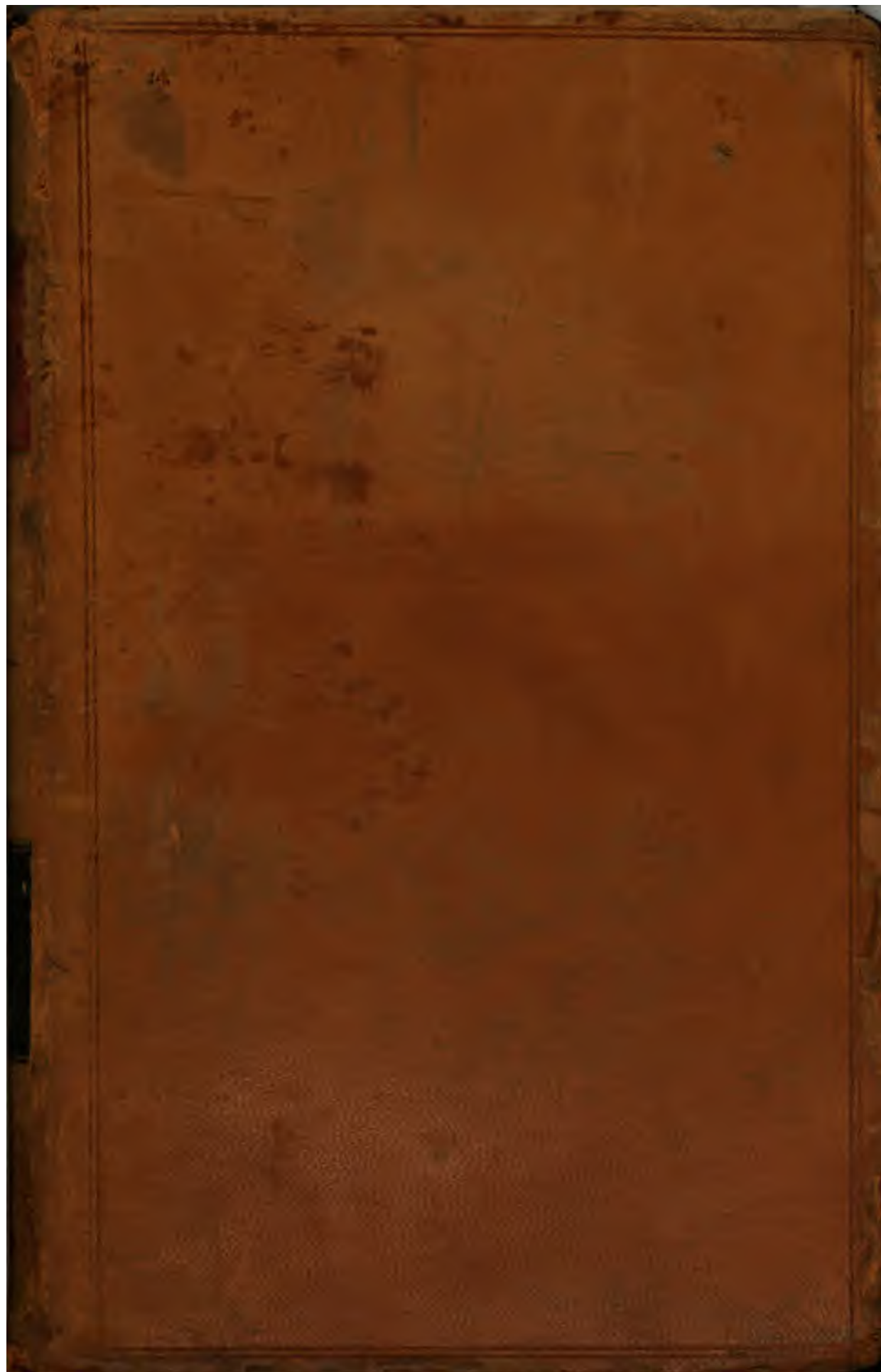
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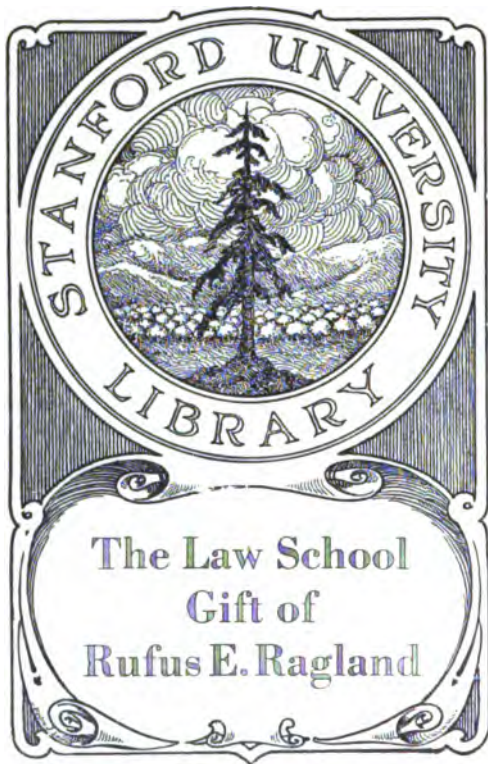
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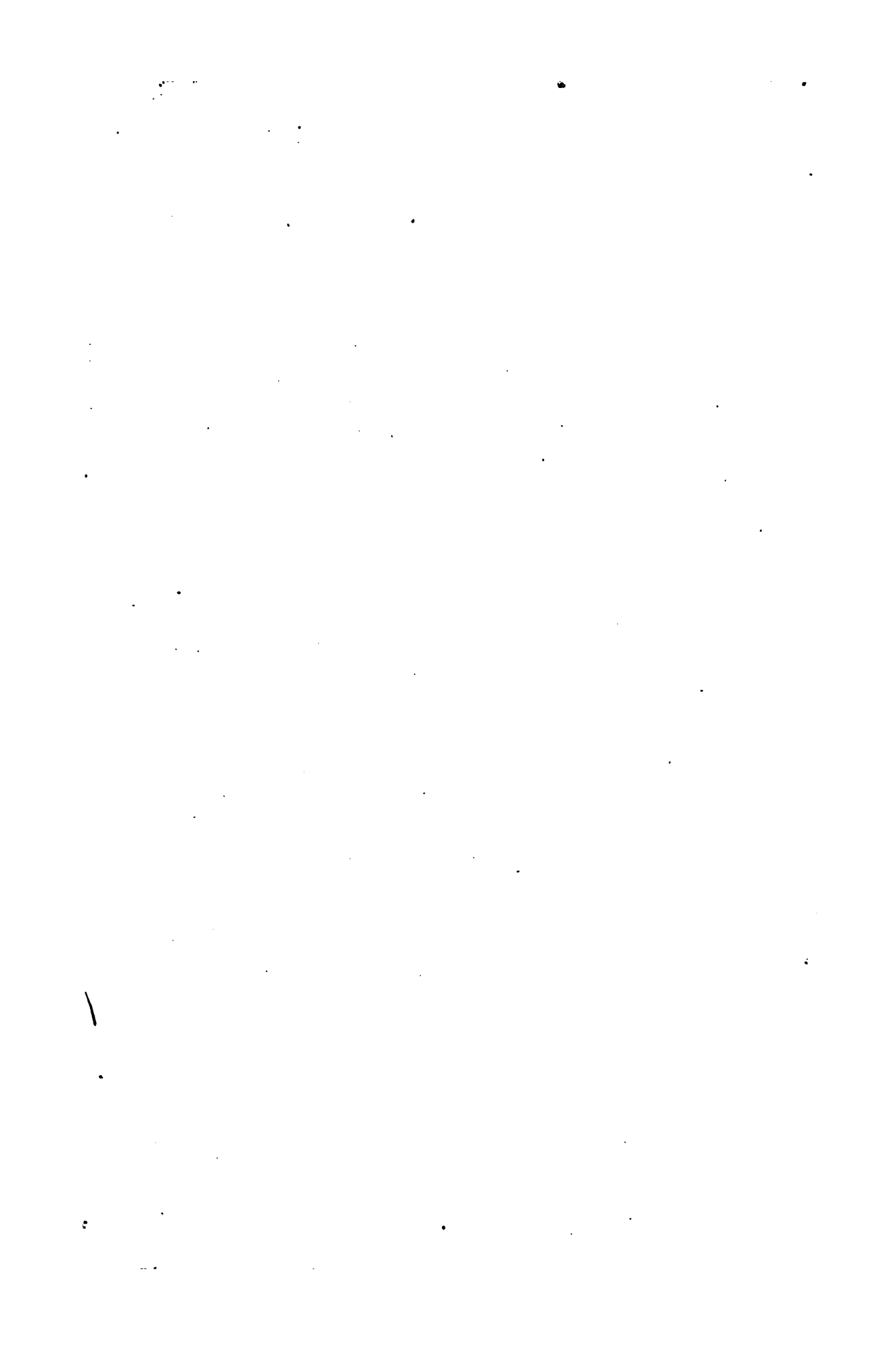
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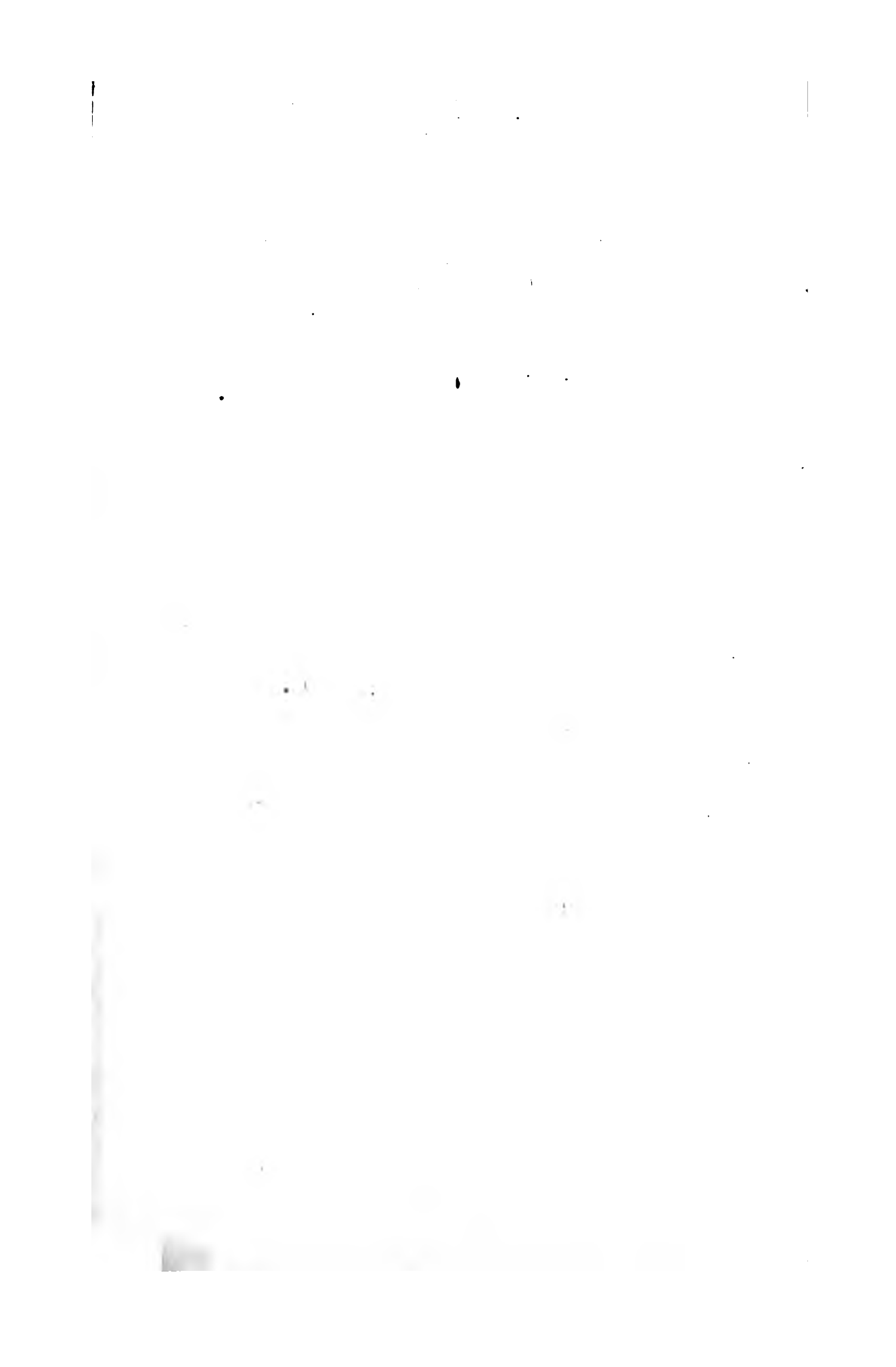
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ENGLISH REPORTS

IN LAW AND EQUITY:

CONTAINING REPORTS OF CASES IN THE

House of Lords, Privy Council,

COURTS OF EQUITY AND COMMON LAW;

AND IN THE

Admiralty and Ecclesiastical Courts;

INCLUDING ALSO

CASES IN BANKRUPTCY AND CROWN CASES RESERVED.

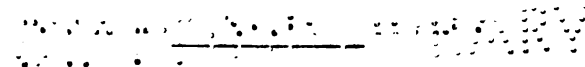
EDITED BY

EDMUND H. BENNETT AND CHAUNCEY SMITH,

COUNSELLORS AT LAW.

VOLUME XVII.

Containing cases in all the Courts of Equity, during the year 1853.



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JUDGES OF THE SEVERAL COURTS

DURING THE PERIOD OF THE DECISIONS REPORTED IN THIS
VOLUME.

THE SEVERAL COURTS OF CHANCERY.

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A

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CASES
ARGUED AND DETERMINED
IN THE
COURTS OF CHANCERY;
DURING THE YEAR 1853.

TRAIL v. BULL.¹

April 13, 1853.

Costs—Allowance to Executors.

A suit was instituted by husband and wife, against the personal representative of the executor of a testator, for the wife's share of a specific legacy bequeathed to four persons. The personal representative of the executor died, and thereby the suit became abated. This suit was abandoned, and another against other parties was instituted.

The costs of the representative of the executor of this abandoned suit were allowed in the accounts, as against the original testator's general personal estate.

THE facts of this case, so far as they are necessary to explain the point decided, were the following:— Charles Salmon, the testator, was entitled to two leasehold houses, amongst others, in Dorset street, and East street, and was entitled to other property. On the 1st March, 1834, he made his will, by which he gave the rent of the two houses to his wife, Elizabeth Salmon, during the time of her life; and after her death, his will was that those houses should be sold, and the proceeds divided amongst his four children. Subject to that bequest, the wife was universal legatee. He appointed his wife and Thomas Bull his executrix and executor, and he died on the 11th October, 1834. Elizabeth, the wife, alone proved the will at that time; and

¹ 1 Equity Rep. 9.

Trail v. Bull.

she took possession of the whole of his property, including the above leasehold houses, and received the rents of them; and she kept possession of the rest of the property, except some parts which were sold, up to the time of her death. At the time of the testator's death, he and Thomas Bull, who were related, were in partnership together, carrying on trade as omnibus proprietors, but early in 1836, the accounts of this partnership were wound up and adjusted. After the testator's death, and at the time of her own death, Elizabeth Salmon carried on, either in partnership with Mr. Bull, or alone upon her own account, the business which the testator had carried on in his lifetime, for her own benefit, using the testator's property and effects for that purpose, and residing in his leasehold houses. On the 21st October, 1836, Mrs. Salmon died, and appointed by her will the above-mentioned Thomas Bull, and a Mr. Greaves, her executors. They, however, renounced probate; and her estate remained unrepresented until December, 1837, when the defendant Bovill, as a creditor of Mrs. Salmon, obtained administration. On the death of Mrs. Salmon the leasehold houses were sold, and three fourths of the produce of this sale, to which they were entitled, were paid to three of the four children of the testator. The plaintiff was the fourth child; and disputes having arisen as to the character of the indemnity to be given to Bull, (who had obtained probate to the will of Charles Salmon in November, 1836, after the death of Mrs. Salmon,) and upon other points, the other one fourth share was not paid over to her. In June, 1840, the bill was filed against the representatives of Thomas Bull and of Mr. Salmon. The object of the bill was to have it declared that the executrix of Charles Salmon had assented to the legacy to the plaintiff and the other children, and for other purposes, but did not pray a general account of the testator's personal estate. It was not, therefore, a legatees' suit. On the hearing, inquiries were sent to the master, who made a separate report, and many exceptions were filed to that report. These were argued and disposed of by Bruce, V. C., in July, 1844; and his decision being in favor of the plaintiff, an order, on petition, dated the 23d May, 1845, was made by him, directing the amount of the one fourth part of the produce of the leaseholds to be paid to her. From this decision and this order the defendants appealed to Cottenham, L. C., who thinking it premature to direct this payment until the whole accounts of the testator's estates were taken in the master's office, reversed the decision of the Vice-Chancellor—directed the exceptions to the master's separate report to stand over until the master had made his general report; and referred it to the master to take these accounts. The general report was subsequently made, to which numerous exceptions by both parties were taken; and having been argued before the late Vice-Chancellor Parker, he, on the 20th July, 1852, made an order thereon, substantially in favor of the plaintiff, from which the present was an appeal.

It was argued that the 20th exception to the general report should be argued separately, and was now disposed of by the Lord Chancellor.

Wilkinson v. Bewicke.

The exception was to the effect that the master should not have allowed, in the accounts of the executor, the payment of a sum of 40*l.* agreed to be considered the amount of costs of said Bull, as executor of Charles Salmon, in a suit commenced by Trail and his wife against Bull, but on his death abandoned by them.

C. P. Cooper and *Tripp*, in support of the exception, contended that the costs had been incurred in respect of a suit by the husband and wife for the husband's benefit alone, and he relied upon an equivocal admission in Mr. Bull's answer filed in that suit to that effect. They, therefore, argued that the representative of Mr. Bull ought to have obtained these costs from the husband, and that they ought not to be charged against the original testator's general personal estate.

J. Russell and *Boyle* for the respondents.

THE LORD CHANCELLOR, however, without calling on the other side, held that the representative of the original testator was entitled to have these costs allowed to him in his account with the general personal estate, as being clearly a proper payment by him, in respect of the personal estate of the testator; and as a liability which he had incurred, which necessarily must be taken into account before the exact amount of the share of the specific legacy could be ascertained. He said he thought that possibly advantage might at the time have been taken of the frame of the suit as having been instituted by husband and wife, instead of being by the wife by her next friend, and that a demurrer on that ground might have been perhaps sustained; but the practice at that time, in this respect, was not so well settled as it was at present.

Exception overruled.

WILKINSON v. BEWICKE.¹

April 19, 1853.

Will—Construction—"Inheritance."

A testator, by his will, gave all his freehold and copyhold hereditaments in the county of D., "which had or might thereafter come into his possession by inheritance from his late father," to trustees for a term of 500 years, upon trust, to provide for the payment, among other things, of an annuity of 3,000*l.* to his wife. Part of the testator's estates in the county of D. were conveyed to him by his father by deed of gift, and he entered into possession of them in his father's lifetime. Other parts of the testator's estates in the county of D. were devised to him by his father's will, he being his father's heir at law. The latter estate was insufficient to provide for the sums charged upon it:—

Held, that the estates acquired by the testator by the deed of gift did not pass by the devise to the trustees.

¹ 1 Equity Rep. 12.

Wilkinson v. Bewicks.

ANTHONY WILKINSON, by his will, dated the 13th March, 1849, among other things, bequeathed to his wife an annuity of 3,000*l.* during her life, and declared that the provision thereby made in her favor, should be taken by her in satisfaction of dower: the testator also gave to his two daughters 15,000*l.*, to be paid to them when they respectively attained the age of twenty-one, or married; and to his son Clennell Wilkinson, 20,000*l.*, to be paid to him when he should attain the age of twenty-one years. The testator afterwards devised and bequeathed unto the trustees therein named, "all, and singular his freehold and copyhold lands, tenements, hereditaments, and premises situate in the county of Durham, which had or might thereafter come into his possession by inheritance from his late father," to hold the same for the term of 500 years, to commence from the day next before the day of the testator's decease, without impeachment of waste, upon the trust and subject to the several uses thereafter declared concerning the same; and after the determination of the said term, and subject thereto, and to the trusts thereof, the testator devised and bequeathed all and singular the said trust estates and premises as in the said will mentioned. The trusts of the term were declared to be, in case the testator's personal estate should be found insufficient for the payment of his debts, funeral and testamentary expenses, and the payment of the said annuity of 3,000*l.* to the testator's wife, of the said legacies of 15,000*l.* each to his said two daughters, of 20,000*l.* to his said son C. Wilkinson, of an annuity of 200*l.*, and two legacies of 500*l.* each, to raise a sufficient sum of money, for which his personal estate should be so deficient, and therewith pay the debts, funeral, and testamentary expenses, and the annuity to his said wife, the legacies to his said two daughters, and to his said son, and the other annuity and legacies, and the costs and charges of proving and executing his said will, "it being his express will and meaning, and he did thereby direct and declare, that none other of his freehold and copyhold estates, than such as had or might come to him by inheritance from his late father, and were situate in the county of Durham, should be liable to, or charged or chargeable with, any of the trusts thereinbefore expressed and declared in regard to the said term of 500 years." And as to the residue of his said freehold and copyhold messuages, lands, tenements, hereditaments, and premises, which had or might come into his possession by inheritance from his late father, and situate in the county of Durham, (subject and charged as aforesaid, and without prejudice to any then existing mortgage, or disposition then previously made of all or any part thereof,) together with all other his real estates, the testator devised and appointed the same to uses and upon trusts, in the manner therein mentioned, in favor of his eldest son, Anthony Wilkinson, for life, with remainder to his issue male in tail, with remainder over in favor of C. Wilkinson and his issue male, and of the female issue of the testator's two sons, and in favor of the testator's two daughters respectively and their issue, in strict settlement as therein mentioned, with an ultimate remainder to the testator's own right heirs. The testator died on the 13th October, 1851, and his said will, with a codicil, not affecting the

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before-mentioned dispositions, were in November, 1851, duly proved in the Prerogative Court of Canterbury. The personal estate, after satisfying the debts, and funeral and testamentary expenses, and a legacy of 300*l.*, and the two legacies of 500*l.* each, amounted to about 1,500*l.* The testator's real estate in the county of Durham consisted of, — 1st. The Castle Eden estates; 2d. The Wilkinson family estates; 3d. The Spearman estates; and 4th. The purchased estates. The Castle Eden estates, which were freehold, were, by indentures of lease and release, dated the 20th and 21st days of January, 1819, in consideration of natural love and affection, conveyed by Thomas Wilkinson, the testator's father, to the testator, who was his eldest son and heir apparent, in fee; and the testator then entered into possession of these estates. The Wilkinson family estates, a small portion of which was copyhold, and the rest freehold, were, by his will, dated the 18th December, 1824, devised by the said Thomas Wilkinson to the testator, therein described as his eldest son and heir apparent, in fee. The Spearman estates, a small portion of which was copyhold, and the rest freehold, were derived under the settlement dated the 3d December, 1781, made on the marriage of the said Thomas Wilkinson, and Hannah Elizabeth his wife. Of this marriage there were four children who attained twenty-one, besides the testator; and the said Thomas Wilkinson purchased of these four children their reversionary interests in these estates. Accordingly, on the death, in 1831, of Hannah Elizabeth Wilkinson, who survived her husband, the testator became absolutely entitled to the entirety of the Spearman estates. The purchased estates consisted of various freehold estates at different times purchased by the testator. The net annual rental of the Castle Eden estates was, at the time of the testator's death, 1,880*l.*; at the present time, 1,670*l.*; of the Wilkinson family estates, at the time of the testator's death, 2,101*l.*; at the present time, 1,835*l.*; and of the remainder of the estates, a considerably smaller amount.

This special case was brought before the court by the testator's widow, for the purpose, among other things, of having it declared whether, upon the true construction of the will, all, or any, and which, of the said freehold and copyhold estates in the county of Durham were or was comprised in the said term of 500 years created by the said will, or subject to the aforesaid trusts thereof.

Malins and *Toller* for the plaintiff, the testator's widow, contended that the strict technical meaning was not to be put upon the word "inheritance." The Castle Eden estates had been derived from the testator's father, and were intended to be included by the testator in this devise. They cited *Trent v. Hanning*, 7 East, 97, and *Doe v. Hazlewood*, 15 Jur. 272; s. c. 2 Eng. Rep. 308.

Bacon appeared for the testator's youngest children, and supported the same view as the plaintiff.

Wigram, for the trustees and executors.

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Roll and *C. Burdon*, for the eldest son and heir at law of the testator, referred to *Doe v. Bell*, 8 T. R. 579; *Bootle v. Scarisbrick*, 1 H. L. Cas. 167; *Napier v. Napier*, 1 Sim. 28; *Jones v. Tucker*, 2 Meriv. 533; *Hoste v. Blackman*, 6 Madd. 190.

Malins, in reply.

Knight Bruce, L. J., said, that the testator in this case was possessed of three portions of real estate; one that he had himself acquired by purchase, in the original and popular sense of the expression; another that he had derived under his father's will, by express devise, but which, as the law then stood, he took by descent; and a third portion his father had given to him by deed or gift in the father's lifetime, some years before the date of the will. After the execution of the deed of gift the father survived for many years, and under it the testator entered into possession in his father's lifetime. Having property of these three different descriptions, the testator gave in a particular way "all and singular my freehold and copyhold lands, tenements, hereditaments, and premises, situate in the county of Durham, which have or may hereafter come into my possession by inheritance from my late father;" or, as he used the expression in another part of the will, "may come to me by inheritance from my late father." The question was, whether that expression could include estates which had been acquired by him by deed of gift, and into possession of which he entered in his father's lifetime; and his lordship was of opinion that the words could not with propriety be so construed, whatever might have been the testator's intention when he so expressed himself, or consented to the use of language in which he was made so to express himself. It was immaterial to consider whether the word "inheritance" ought to be construed as a word of art; because if it was not to be so construed, and it was to be taken that the testator did not know that he had in strictness acquired the property devised to him by descent, still it had devolved to him by the act and upon the death of his father. Therefore, the word "inheritance," as applied to it, was not altogether inaccurate or inappropriate, whatever it might be supposed that the testator understood or did not understand of legal rules. It seemed to his lordship that, if to the property which the testator acquired from his father, whether by descent or by will, these words were applicable, it was impossible to say that these words applied to property taken by gift in his father's lifetime, and into the possession of which he entered during his father's life. Nothing could warrant such a construction but the impossibility of finding any other subject to which with any degree of correctness to apply the terms. There was a subject to which the term could with correctness be applied; and therefore, not without some degree of regret, his lordship has come to the conclusion that the Castle Eden estates were not included in the trusts of the 500 years' term.

Turner, L. J., said, that two questions arose upon the words of the will: the first, whether, there being property which was strictly

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according to law taken by "inheritance," any other property than that so taken could be held to be included in the devise; and secondly, whether, if any other property could be taken as included in the devise, the Castle Eden estate could be so included. The rule of law was perfectly well established, that technical words must be construed according to their technical meaning, unless it could be shown by the context, that another meaning could be put upon them. Again, it was another rule, that, where a deviation was allowed, the context of the will must be very clear to include in the devise other property than that which answered the description. The context of the will might be looked at for the purpose of finding whether there was any intention that property should pass, other than that which strictly answered the description of property coming to the testator by inheritance from his father; that property should pass which would not strictly fall within these words. The question as to the context was much discussed in the House of Lords in a case where there was a context in the will which explained the name of the devisee, and upon that context the house allowed a devisee to take, who did not properly answer the name in the will; but that was done because the description in the will was not properly applicable to any particular person. It appeared to have been admitted there, that if there had been a description in the will answering to any particular person, it would not have been competent to the court to have included another person in the devise, who did not answer to the description. But his lordship felt much pressed by the argument of Mr. Burdon on that subject, namely, that if the property charged had been sufficient to pay the charges which the testator had made upon it, could the court have altered the construction of the will? There being then property answering the description, it was not competent to the court to introduce other property, there being nothing to show that the testator intended it. Again, upon the second point, whether, if any other property could be taken to be included in the devise, this estate could be so included; his lordship considered that the Castle Eden estate could not be included, because the word "inheritance," used by the testator, implied a devolution, and not a transfer. The effect, therefore, would be that this estate, which became the property of the testator by deed of gift, was taken by transfer, and did not pass under the will as an estate which came to him by inheritance from his father.

Ainslie v. Sims.

AINSLIE v. SIMS.¹

April 15, 1853.

Security for Costs — Foreign Domicil — Temporary Residence within Jurisdiction.

The plaintiff was described in the bill as "of Fort William, Inverness, in the kingdom of Scotland, but now residing at 8 Edmund Place, Aldersgate street, London." The defendant's affidavits stated that the plaintiff's residence and business were in Scotland, and that he had recently taken furnished lodgings in London, but not for any stated time. No affidavit was filed in reply to this part of the case: —

Held, on motion for that purpose, that the plaintiff must give security for costs.

THIS was a motion that the plaintiff might give security for costs.

The plaintiff was described in the bill as "of Fort William, Inverness, in the kingdom of Scotland, but now residing at No. 8, Edmund Place, Aldersgate Street, in the city of London."

Two affidavits were read in support of the motion. One stated that the house in Edmund Street was tenanted by a Mr. Forbes, and that the plaintiff had lodged there a short time, and was still lodging there, but had not engaged the apartments for any stated time. The other affidavit stated, upon belief, that the plaintiff resided at Fort William; that he had for many years carried on, and did still carry on, either by himself or in partnership with his brother, very extensive mercantile transactions.

The only affidavit filed by the plaintiff stated that the defendants had commenced an action against him in the Sheriff's Court, at Inverness, and by virtue of an order made in that action, the whole of the plaintiff's estate and effects were under arrestment at the defendant's instance.

Roundell Palmer and *G. L. Russell*, in support of the motion, cited *Green v. Charnock*, 3 Bro. C. C. 371, 372; *Cox*, 284; and *Seilaz v. Hanson*, 5 Ves. 261.

Roupell and *Martindale*, contra. The plaintiff is resident in London, though domiciled abroad. There is no allegation that the plaintiff is about to leave England. The rule is, that where neither the person nor the property is within the jurisdiction, then security must be given. The application is premature. So long as the plaintiff is in England, the court will act by attachment. When it is shown that the plaintiff is abroad, or is doing acts to defeat the right of the defendant to have his costs secured, then the court will make an order; but until that happens the court will not interfere.

In re Buckley's Trust.

THE MASTER OF THE ROLLS. The question upon this motion is, whether the plaintiff has such a residence in England as will enable the defendant to find him whenever it may be necessary; and I am of opinion he has not. I by no means say that a party taking up his abode in England, by engaging a furnished house for a stated period, must give security for costs. Here, the plaintiff is domiciled in Scotland, and has come to London and taken lodgings for no stated time; and it is quite consistent with all that has appeared, that he may have come here to avoid giving security. A person residing abroad, and coming to England temporarily, might by such means avoid giving security; and he might afterwards from time to time come over when he found it necessary for any proceedings. If the plaintiff came here for a visit, that is not sufficient residence. It would be otherwise had he come upon permanent business,—of which there is no evidence; and I am of opinion, the plaintiff must give security.

In re BUCKLEY'S TRUST, AND In re 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74.

April 19, 1853.

Trustee Relief Act — Purchaser of Estate subject to payment of Legacies, not a Trustee within meaning of Act — Costs.

A party purchasing an estate, expressly subject to the payment of legacies charged thereon by will, is not a trustee within the meaning of the Trustee Relief Act, and having paid the money into court under that act, and presented a petition for its investment, or for repayment to the petitioners, the court directed the money to be paid out to the petitioners, and ordered the petitioners to pay the respondents' costs.

JOHN BUCKLEY by his will directed his executors to place out at interest upon real security, at the end of twelve months after his decease, two sums of 500*l.*, upon certain trusts, for the benefit of the testator's daughters and their issue; and subject and charged therewith, he gave and devised his residuary real and personal estate to his four sons absolutely. The personal estate proved insufficient for the payment of these legacies. Soon after the death of the testator the devisees sold the real estate, and a portion of it was purchased by Messrs. Ormerod, and conveyed to them expressly charged with the payment of these legacies in exoneration of the residue of the real estate. Several applications for payment were made to Messrs. Ormerod by persons claiming to be entitled to the legacies; but not being satisfied as to the right of such persons to these legacies, Messrs. Ormerod, in February, 1852, paid the two sums of 500*l.* and interest

In re Buckley's Trust.

into court, under the provisions of the Trustee Relief Act. This having been done before the order of the 7th May, 1852, the money remained uninvested.

Messrs. Ormerod now presented a petition praying a declaration that they came within the meaning and intention of the Trustee Relief Act; and that they were justified in paying the money into court, and that an order might be made for the investment of the money. That in case the court decided they were not justified in so doing, then that the money might be paid out to the petitioners; and that in either case the costs might be paid out of the fund.

Elmsley and Crofts in support of the petition.

Prior, contra.

THE MASTER OF THE ROLLS. I think this case does not come within the meaning of the act. The words of the act are, "all trustees, executors, administrators, or other persons having in their hands moneys belonging to any trust whatsoever." I do not see what money the petitioners have in their hands belonging to any trust. The meaning of the act is, that where a trust has been created, and the person having the money is unable to ascertain to whom the money is legally payable, such person may pay the money into court. Here there is no money in the hands of the petitioners. They have an estate subject to a charge, and I am asked to decide that they have a right to raise the money and create themselves trustees for the purpose of taking advantage of the act. The effect of allowing this petition would be to give every person, entitled to land subject to a charge, a right to pay the money into court. When a testator gives a legacy and charges it upon his estate, the legatee is entitled to the expenses of raising it; but if I were, in the present case, to allow the money to be paid into court under the act, the costs would fall upon the legatee. I am of opinion that the act was not intended to meet this case. No case has been cited, and I understand the point has not been decided. The order I shall make will be, to direct the money to be paid out to the petitioners, and the petitioners to pay the respondents' costs.

HOPKIN v. HOPKIN.

HOPKIN v. HOPKIN.¹

April 12, 1853.

Writ of Ne Exeat — Affidavit — Irregularity — Costs — Practice — Second Writ.

Where a writ of *ne exeat* had been granted on affidavits sworn before the plaintiff's own solicitor in the cause, the court discharged the writ with costs, and refused to put the defendant under terms not to bring an action:—

Semble, that the affidavits should state expressly that the property would be endangered if the writ was not granted.

Quare, whether a second writ can be granted where the defendant has been arrested, and has put in bail on one which is afterwards discharged, on the ground that the affidavits were improperly sworn.

ELMSLEY (*Pemberton* with him) moved to set aside a writ of *ne exeat*, on the ground that the affidavits on which it had been granted were irregular and insufficient, and he also moved upon the merits. He contended that the affidavits were insufficient, in not stating that the property would be endangered if the writ was not issued. All the cases had assumed that such a statement was necessary, and the struggle had always been whether it was not necessary to state that the defendant was going abroad to avoid the demand. *Tomlinson v. Harrison*, 8 Ves. 32; *Stewart v. Graham*, 19 Ves. 313.

[VICE-CHANCELLOR. Is it necessary to state in so many words that the property will be endangered? Here the affidavit states that the defendant had said, "What I have got I shall keep."]

The case of *Boehm v. Wood*, 1 Turn. & Russ. 332, seems to go that length. Then the affidavits were sworn before the plaintiff's own solicitor; that is clearly an irregularity. Daniel's Ch. Practice, vol. 2, p. 1436, referring to *In re Hogan*, 3 Atk. 813; in which case Lord Hardwicke said, if he had known the affidavits had been so sworn, he would not have allowed them to have been read; and dismissed the petition with costs, to come out of the solicitor's own pocket, for thus improperly taking the affidavits. *Wood v. Harpur*, 3 Beav. 290.

Amphlett was then called on to support the writ. He admitted that the affidavits were sworn irregularly, and that if a motion had been made to take them off the file it would have succeeded; but if on the merits there was a clear case, the court would immediately grant another writ. The affidavits had been re-sworn, and the averment added, the want of which was complained of, and the court would not, on a mere formal objection, discharge the writ.

THE VICE-CHANCELLOR said it was not a mere objection of form,

¹ 1 Equity Rep. 20.

Hopkin v. Hopkin.

but an irregularity which the court considered important, and he should discharge the writ with costs.

Amphlett then asked that the defendant might be put under terms not to bring an action.

THE VICE-CHANCELLOR asked if there was any authority for doing that.

Amphlett said it was in the discretion of the court to refuse costs, unless such an undertaking was given.

THE VICE-CHANCELLOR declined to put the defendant under any terms. As to the other point, he said he should abstain from giving any opinion, but he thought the objection a serious one.

Amphlett then moved *ex parte* for a new writ, and also that the defendant might pay into court the balance admitted to be in her hands as executrix.

THE VICE-CHANCELLOR said he should prefer giving leave to serve notice of motion for the next day.

April 13. *Amphlett* now renewed his motion.

Elmsley interposed, and said that a second writ could not be granted after the defendant had been once taken and discharged. *Amsinck v. Barklay*, 8 Ves. 594. That case only differed from the present, inasmuch as the first writ was a common law process. But the analogy is perfect; and Lord Eldon there says, "This sort of regard ought to be paid to personal liberty, that you ought to be sure when you begin." *Raynes v. Wise*, 2 Mer. 472, is to the same effect.

Amphlett contended that the ancient rules at common law on this subject were very stringent, but even at common law the courts exercised a discretion in such matters. 1 Tidd's Prac. 174. In *Roddam v. Hetherington*, 5 Ves. 91, the court discharged the writ as having been issued on insufficient affidavits, but made the defendant give security for the balance admitted by the answer to have come to his hands.

THE VICE-CHANCELLOR. That was actually the same thing as issuing a new writ. At all events, before deciding the point, I should like to hear the merits of the case.

Upon the merits being gone into, the case was compromised, and no further opinion given upon the point of whether a second writ could issue.

 Poole v. Bott.

POOLE v. BOTT.¹

April 14, 1853.

Will — Construction — Vested — Bond — Restraint against Marrying — Cohabitation.

A testator gave all his real property to his sons, in equal shares, as tenants in common, to be vested in them, as to one moiety, when each son should attain the age of twenty-one, and as to the other when the youngest son for the time being should attain twenty-one; and in case any of them should die before his respective moieties became vested, he gave the unvested share, which should belong to such son, to his other sons. And he directed the guardians appointed by the will, to receive the rents of the shares during the minority of his sons, and apply the whole or any part to their respective educations:—

Held, that "vested" must be taken to mean "not liable to be divested," or "vested indefeasibly."

The testator directed the trustees not to pay over the shares of the sons, or permit them to enter upon the real estate, until they had given bonds not to marry or illegally cohabit with the daughters of a person named. The court declined, on the application of a party having a remote interest, to direct such bonds to be given.

THIS case came on on further directions. The questions arose on the will of Michael Bott, by which, after directing the payment of his debts, funeral and testamentary expenses, and giving certain specific legacies, he gave and devised unto his four sons, John, Thomas, Charles, and Philip Bott, all his freehold, copyhold, and leasehold messuages or tenements, to hold the same to the use of his said sons, their respective heirs, executors, administrators, and assigns, in equal shares, as tenants in common, and to become vested in his said sons at the times following; that is to say, one moiety when and as his said sons should respectively attain the age of twenty-one years; and the remaining moiety when and so soon as his youngest son for the time being should attain the age of twenty-one years; but in case any one or more of his said sons should die before the respective moieties of and in his or their share or shares of and in the testator's said freehold, copyhold, and leasehold estates should become vested as last aforesaid, then he gave and devised such unvested share or shares of and in the said messuages, tenements, farms, lands, and hereditaments as should belong to his said son or sons respectively so dying as aforesaid, and also the share or several shares of and in the same hereditaments which the said son or sons respectively should take under the present provision, unto and to the use of the other or others of his said sons, and his or their respective heirs, executors, administrators, and assigns, share and share alike, as tenants in common, and to become vested at such ages, days, or times as his or their original share or shares. And in case all his sons should die under twenty-one, then the testator gave the said hereditaments to his own right heirs. The testator then gave all the residue of his personal

¹ 1 Equity Rep. 21.

Poole v. Bott.

estate to trustees on trust to pay his debts, funeral and testamentary expenses, and as to the residue in trust for his said four sons equally, one moiety to become vested in and payable to them respectively, when and as they should respectively attain the age of twenty-one years; and the other moiety when and so soon as his youngest son for the time being should attain the age of twenty-one, with the same provisions in case of any of the sons dying under twenty-one, as were provided in respect of the real estate; with a proviso that the trustees should apply the dividends and interest or such part thereof as in their discretion should be thought necessary, of the shares of such of his sons as should not have acquired a vested interest for his or their maintenance, with the usual clause for advancement; and an ultimate trust in case all his sons should die under twenty-one years, for the persons who would be entitled, under the Statute of Distributions, in case he had died intestate immediately after the failure of such issue. The testator then provided that in case any of his sons should intermarry or illegally cohabit with any of the daughters of a person therein named, then the original and accruing share of such son should go over to the persons who would have been entitled in case that son had died under twenty-one. And the testator declared that it should not be lawful for his trustees to pay his sons the amount bequeathed to them, or to permit them to enter upon the real estate, until they should have given to the trustees bonds in the sum of 20,000*l.* that they would not so intermarry or illegally cohabit. The testator then appointed his trustees to be his executors and guardians of his sons, and empowered them as such guardians to receive the rents and profits of the shares of his sons in the real estate during their minorities, and to apply all or any part thereof to their respective maintenance, education, and advancement.

The testator died on the 29th December, 1846, leaving the four sons named in the will him surviving.

The eldest son died under twenty-one; the second and third had attained that age; and the fourth was still under twenty-one.

Follett and *E. F. Smith* appeared for the heir at law, and contended, that he was entitled to the rents of the real property up to the times at which the testator directed the different shares in the estate to vest. The words of the will were as strong as could be, to prevent the vesting of the estate before the times mentioned. Reliance would be placed, on the other side, on the guardian clause; but that was a discretionary power, and could not apply to vest the estate in opposition to express words to the contrary. It was a power in aid of the personal estate.

C. Barber, for the sons, contended that the will contained, first, a clear gift to the four sons, and then ambiguous words as to the time of vesting. "Vested" might be construed to mean, "not subject to be divested." *Taylor v. Frobisher*, 5 De Gex & Sm. 191; s. c. 11 Eng. Rep. 117, was a very similar case. The guardian clause was not a mere power to provide for the education of the children,

Poole v. Bott.

but a power to receive the whole rents of the respective shares, and to apply all or any part to the maintenance, education, and advancement of the son entitled to such share.

Dickenson appeared for the personal representatives of the deceased son.

Charles Hall, for the executors. *Shapter* and *Shee*, for other parties.

Follet, in reply, contended that *Taylor* and *Frobisher* was distinguishable. In that case there was a good reason for the meaning given to the word vested.

THE VICE-CHANCELLOR said, the case was one of those which must depend on the exact words; and, looking at the whole will, he must hold, that there was an immediate gift to the sons liable to be divested on certain events. The legal sense of "vested" was, that the party was not to take any interest till that time; but we find what the testator here wishes to be the meaning of it. He divides the shares into two moieties, to be vested at stated times; but, in case one or more of his said sons should die before the respective moieties of his share should become vested, then he gives such unvested share, which should belong to such son, to the other-sons. Therefore, he speaks of the "unvested share" as something belonging to his sons. If it had stopped there, I should not, perhaps, have been satisfied; but, then we come to the guardian clause. In respect of the real property, the testator has not done as he did with respect to the personal estate; he has not interposed trustees, but he has made an immediate gift; and then he tells the guardians to receive the share which, in the previous part of the will, he had designated as belonging to his sons. Therefore, on the whole, I must consider that vested means not to be divested, or indefeasible. The other construction would be very improbable. The testator could hardly have intended, that the guardians should have power to receive all the rents during the minority of each son; but that during the intervals between each son coming of age, and the majority of the youngest son, a moiety of the rents of such son's share should be undisposed of.

Snape on behalf of the next of kin, who would become entitled in the event of all the sons acting in breach of the condition in the testator's will, then contended, that the court would compel the sons to give bonds as required by the testator. The cases in which similar bonds had been considered void, were all upon wagers. A bond not to marry a particular individual was good; and therefore the only question was, whether the introduction of the provision against illegally cohabiting, made any difference. In *Da Costa v. Jones*, Cowp. 729, Lord Mansfield says, that "indecent evidence is no objection to its being received, when it is necessary for the decision of a civil or criminal right."

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C. Barber contended that the next of kin had no interest which the court would recognize in the matter.

THE VICE-CHANCELLOR. I shall direct the money to be handed over without the bonds being given. It is suggested, that there is just a possible interest in the party who now asks that they may be given. If the bonds were given, the tendency would be to lead to inquiries which would disturb the peace of a family not in any way concerned in the testator's will.

PATTENDEN v. HOBSON.¹

April 18, and 20, 1853.

*Practice — Further Directions — Defaulting Executors — Will —
"Heirs of Body."*

A case of wilful default and negligence was alleged on the pleadings against executors for not having sold the testator's estate, and at the first hearing, accounts and inquiries were directed :—

Held, on further directions, that as at the original hearing it was not ascertained who the parties entitled under the will were, the defendants were still chargeable with their breach of duty.

Held, also, that as the testator's widow, a co-executrix with another defendant, had received the rents and profits during the whole period, her estate was liable to make good the surplus over what she would have been entitled to, in case there had been a sale and investment according to the will.

Held, also, that where personalty is given by will to a person, and in the event of that person's death to "the heirs of her body," all the children of the party are entitled to take equally.

WILLIAM HELDER, the testator in the cause, by his will dated in 1823, after various bequests to the plaintiff and others, proceeded as follows : " And all the remainder of my property, of what kind soever or wheresoever it may be at the time of my decease, I leave to my dear wife, Mary Helder, for her use during her natural life, to be vested in the public funds in the joint names of my executors hereinafter mentioned ; but besides what I have in the former part of this my will bequeathed to my wife Mary Helder, I also will and bequeathe to her my business of dyer, carried on at my house in Carpenter Street ; and also a lease of the said house and premises for the term of twenty-one years to be granted to her from the time of my decease ; and at the demise of my dear wife, Mary Helder, the rest of my property to be equally divided between my children, share and share alike, namely, my daughters Susannah Warne, Rebekah Pattenden, and Sarah Beer, my three remaining daughters, for their own proper

¹ 1 Equity Reports, 28.

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use and benefit, without control of their husbands or to the heirs of their bodies lawfully begotten, should they be taken away before the time of our demise; and my daughter, Hobson, who is deceased, and left two children, I will and bequeathe to them their late mother's share of my property, namely, I will and bequeathe to my grandsons, John and James Hobson, what should have been the mother's part, had she outlived me. I mean that they shall come in for an equal share with my three now living daughters before mentioned; and I do hereby constitute and appoint George David Hobson, Mr. Marriott, and my dear wife, Mary Helder, my joint executors of this my last will." On the 8th January, 1824, the testator made a codicil to his will, and thereby gave a copyhold estate in Sussex, which he had lately purchased, to his wife for life, and after her decease he directed his executors or administrators for the time being to sell the same, and the moneys to arise by sale to be received by them in aid of his personal estate, and go in the same manner as his personalty. The testator also made another codicil, whereby he bequeathed certain goods and effects in his house near Lewes to his wife. The testator died on the 2d October, 1825, leaving his wife, daughters, and grandsons surviving. In 1847 the present bill was filed, and, after stating the will alleged that the executors had possessed themselves of the estate, and had granted a lease of the house in Carpenter Street to the widow, which lease expired in 1846, and that she had taken possession, and still was in possession of the testator's estate. That Marriott, one of the executors, died in May, 1847, having previously accounted to his co-executors. That testator's daughter, Sarah Warne, died in August, 1848, a widow, leaving five children, and that Thomas Warne (one of them) was her personal representative. The allegations in the bill then went on to show that the widow and the other executors had obtained possession of the testator's estate, but had not invested it as was directed by the will. The bill then charged that they had wasted the estate; that they had not sold the freehold and leasehold property, as they were bound to do, immediately after the death of the testator, by reason of which the widow had received more than she was entitled to; that other parts of the property were in a decayed and ruinous estate, and that it would cost a large amount of money to put them in a state of repair. The bill then prayed the appointment of a receiver, that accounts might be taken of the personal estate; that there should be a sale, and that the widow and Hobson might make good the loss of the plaintiffs and the parties interested, by reason of the freehold and leasehold premises not having been sold; and that they should be in the meantime restrained from selling, disposing of, or granting leases of the property. The cause was heard, and a decree made establishing the will, declaring the trusts ought to be performed, and directing accounts of the real and personal estate of the testator to be taken; and the master was directed to inquire as to the parties interested under the will. An order was also made for the appointment of a receiver. The cause now came on on further directions, accounts having been taken, and a receiver appointed; the questions to be

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argued being, whether at this stage of the case the executors were still chargeable with their defaults? Whether Hobson, one of the executors, was to be held liable, the widow having in fact been the person who had benefited by the default? Whether, on the construction of the will, the heir of Susannah Hobson or her children generally were entitled under the will?

Shapter for the plaintiff.

Craig and *Fischer*, for the defendant Hobson. Mrs. Helder has here had possession of, and control over, the whole estate; she has received all the rents and profits, and Hobson cannot, therefore, be held liable. *Green v. Badley*, 7 Beav. 271; *Coope v. Carter*, 21 Law J. Rep. (N. S.) Chanc. 570; s. c. 15 Eng. Rep. 591; *Garland v. Littlewood*, 1 Beav. 527; *Jones v. Morrell*, 2 Sim. (N. S.) 241; s. c. 13 Eng. Rep. 69.

A. Smith for Mrs. Helder's representative, she having died since the institution of the suit.

Vance, for the next of kin of Susannah Warne. There are three classes of cases resembling the present. The first is, where property is given to the heirs at law of any person; the second, where it is given to the heirs; and the third, as in the present case, where the gift is to the heirs of the body. In those cases falling within the first class, the words are construed strictly. *Ware v. Rowland*, 12 Jurist, 165. In the second class, where the gift or devise is to the heirs, the rule is flexible, and may mean next of kin or heir at law, according to the nature of the property given, whether real or personal. *Dooly v. Higgins*, 9 Hare, 32, App.; *Gittings v. M'Dermott*, 2 M. & K. 73; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524. The third class is also flexible, and means, if applied to personalty, that the children next of kin should take. *Price v. Lockley*, 6 Beav. 180. The case before the court is clearly similar to that of *Price v. Lockley*. Here the property has been directed to be sold, inasmuch as though there has been no express direction to sell, yet there is a direction to invest the property in the purchase of stock, and therefore there must necessarily be a sale. It is contended, therefore, that all the children of Susannah Warne are entitled to one fourth share of the testator's estate.

Hislop Clarke, for the heir at law of Susannah Warne, contended, that the word must be construed strictly, and must mean the heir of the body. Here there was no express direction to sell the real estate, (unless the direction to invest in the funds can be so considered,) and therefore nothing to alter the legal meaning of the words. And the case of *Jesson v. Wright*, 2 Bligh, 1, show that these words must be construed according to their strict legal meaning, unless there is something to control it. Of the cases cited on the other side, only one, that of *Price v. Lockley*, has any resemblance to the present case,

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where the words used are "heirs of the body." On the whole of the case, he submitted that the other children of Susannah Warne were not entitled to participate in the gift.

THE VICE-CHANCELLOR, having previously expressed his opinion that if Mrs. Helder's estate was made liable for the difference between the rents received and the dividends which would have been received, then it would not be liable for the default in allowing the property to go out of repair, said, — In this case I have first to consider the question, whether Mr. Hobson is liable to make good the loss sustained by the estate; and secondly, the question as to the meaning to be given to the words "heirs of the body," whether they are to be strictly construed, or mean all the children of the party. The will is, no doubt, inartificial in its form; it contains no express directions to sell; but after certain specific bequests or devises, the testator gives these directions: "And all the remainder of my property, of what kind soever, or wheresoever it may be at the time of my decease, I leave to my dear wife, Mary Helder, for her use, to be vested in the public funds," &c. Here we have a clear direction, that all the residue of the testator's property is to be vested in the public funds, — a proceeding which necessarily pre-supposes the sale and conversion into money of the whole estate. It is manifest, therefore, that all the property ought to have been sold. Afterwards the testator adds, "But besides what I have in the former part of my will bequeathed to my wife, Mary Helder, I also will and bequeathe to her my business of dyer, carried on at my house in Carpenter Street, and also a lease of the said house and premises for the term of twenty-one years." Now, did the testator, by directing that this lease should be given, postpone the sale until after the expiration of the lease, or was the sale to be immediate? I can see nothing to show an intention to postpone the sale. If the testator had held the property subject to a lease, the direction to sell would mean the sale of the reversion, and I cannot see how in this case there can be any different rule. It seems to me, therefore, that if the testator's directions were carried out, a beneficial lease should have been granted to the wife, the property sold subject to the lease, and then the proceeds of the sale would have formed part of the *corpus* of the testator's estate.

The codicil, indeed, specially directs that the sale of the property comprised therein should not take place until after the decease of his wife; but this cannot effect the previous directions given by the will. Then the testator goes on to direct, after the death of his wife, the rest of the property to be equally divided between his children, share and share alike, "or to the heirs of their bodies, lawfully begotten, should they be taken away before the time of our demise." If he had stopped at the gift to his daughters, there is no doubt that they would have taken absolutely; but we have first to determine what is the meaning of the words "our demise;" and on this point I think it quite clear, that he did not intend the children to take until the death of the survivor. The consideration of the words, heirs of the body, will be reserved until Mr. Hobson's liability be decided.

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There is no doubt that all the property, except that mentioned in the codicil, ought to have been sold immediately; and it has not been sold up to this time. Whether the executors had power to sell the freehold property I cannot determine, but at any rate they had ample power to sell the leasehold. A question has been raised whether on further directions the liability of Hobson can be discussed or whether it ought not to have been decided on the original hearing. I take the rule of practice on this subject to be clear: if the bill pray relief against the defendant, and at the hearing the court is in a condition, with reference both to the parties and the facts, to determine the question, it ought to be then decided. But if the court is not in a position to do so, then it will at the original hearing direct inquiries to determine who and what are the proper facts and parties. And if the court does do so, then the matter is open on further directions. Now here the parties interested in the question of Mr. Hobson's liability will be, under the circumstances of the death of Susannah Warne, the persons who may be substituted for her. There is no *constat*, that all the parties are before the court, until that be determined; and any question in which they may be interested, must be considered as reserved by the direction for inquiry and accounts. The liability of Mr. Hobson is, therefore, still open to the court to determine. Ought he then to be held liable? And in arriving at a conclusion on this point, I am somewhat embarrassed by the frame of the bill. The bill has been amended, and many of the statements are inaccurate. Mary Helder is stated to have received the rents and profits of the copyhold premises, and to be now in the receipt of them. Then Hobson is charged with having wasted the effects of the testator, by reason of not having sold. It is then charged that the amount of the rents received, exceeds the amount of dividends which would have accrued, if the property had been invested in the funds, and that Mrs. Helder ought to account for the surplus. There are other charges in the bill which are inconsistent with the rest of the bill. [His honor referred to the various charges in the bill in detail, and then went on.] It appears to me quite clear from this state of facts, that Mrs. Helder is liable for the excess received by her over what the amount of dividends would have been. That is the remedy to which I conceive the plaintiffs are entitled under the circumstances, and I do not consider I ought to hold Mr. Hobson liable to make good the loss. Let there be then a direction to ascertain what would be the value of the leasehold property, including the reversionary interest in the Carpenter Street property, if sold, and the proceeds invested in stock, and the amount of dividends arising therefrom. Let there be also an account of the rents received, and a declaration that Mrs. Helder's estate be liable to make good the difference between them, and the dividends receivable from the same if invested in stock.

The only remaining question is as to the meaning of the words "heirs of the body," about which it is not contested that it is a substitutionary limitation, the daughters taking in the first instance, and in case of their not surviving, then the property to go to their children.

Nicholson v. Jeyes.

As I observed previously, on the true construction of the will, the testator directed the estate to be converted into personalty. Now there were several cases referred to in the course of the argument illustrative of this question. And I apprehend that there can be no doubt that where the words "heirs," or "heirs of the body," are used, that the meaning is flexible. That when applied to real estate they must be construed according to their strict legal meaning, but, when used as to personalty, the word "heirs" is held to mean next of kin, and the words "heirs of the body" interpreted as "the next of kin, issue of the body." Declare, therefore, that the children of Susannah Warne be entitled to take equally.

NICHOLSON v. JEYES.¹

April 16, 1853.

Practice — Costs — Fees to Counsel — Mortgagee — Settling Conveyance.

Counsel's fees for settling a mortgage deed, on behalf of a mortgagee advancing money ordered to be raised in a suit, were directed to be allowed, in taxing the mortgagee's costs.

Mr. G. SIMPSON, on behalf of a proposed mortgagee, applied, by permission of Stuart, V. C., for the insertion, in an order made in this cause, of words directing the taxing master to allow the mortgagee the fees to his counsel for settling the mortgage deed and securities. By the order, which was made on the 26th January last, the costs of the suit were directed to be raised by mortgage, and the present applicant was willing to make the necessary advance; but whether the fees to his counsel for settling the securities would be allowed to him was considered doubtful in consequence of the instructions to the taxing masters, issued by the Lord Chancellor, St. Leonards, on the 24th December, 1852.¹ The applicant had, in order to save expense to the estate, agreed to accept the title, but it was necessary for his counsel to look into the abstracts to ascertain the state of the

¹ 1 Equity Rep. 34.

² These instructions are as follows:—"Where, in pursuance of any direction by the court or judge, or of any request by a master in ordinary, drafts are settled by any of the conveyancing counsel under 15 & 16 Vict. c. 80, s. 41, the expense of procuring such drafts to be previously settled by other counsel is not to be allowed on taxation as between party and party, or as between solicitor and client, unless the court shall specially direct such allowance. This intimation, however, is not to prevent the allowance of the expense in cases which may already have occurred, where, in the judgment of the taxing master, there has been a reasonable ground for laying the papers before other counsel."

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title sufficiently to draw the deed. The counsel's duty was, therefore, more onerous than under ordinary circumstances.

KNIGHT BRUCE, L. J., said that he considered the mortgagee must have all his reasonable costs to which, according to the usual course of practice out of court, he, as mortgagee, would be entitled.

TURNER, L. J., said, that as the order had directed that the mortgagee should have his costs, charges, and expenses, the words "including his reasonable and proper charges of settling the security" might be added.

HARRINGTON v. MOFFAT.¹

April 18 and 23, 1853.

Will — Bequest of "Shares and Interest" in a Company — Policy of Assurance with Company, on Testator's Life, does not pass under.

A shareholder in an unincorporated insurance company, by whose rules every holder of shares was required to effect an insurance with the company, by his will gave to A. and B. "all and every of his shares and interest in the company, and all the advantages to be derived therefrom." The words "shares and interest," were also, in other parts of the will, used with reference to companies of different kinds:—

Held, that the policy of assurance effected by the testator with the company, did not pass under the bequest.

THIS was an appeal from the decision of the Master of the Rolls, upon a special case. William Moffat made a will, or deed of disposition, in the form used in Scotland, and dated the 5th August, 1834; and he also made a codicil thereto, dated the 28th August, 1841. By another codicil, dated the 22d September, 1841, the testator "gave, granted, assigned, bequeathed, devised, and disposed to, and in favor of his said trust disponees and their foresaids, first, all his freehold house therein mentioned; second, the whole and all and every of his shares and interest in the Rock Life Assurance Company on lives and survivorships, and all the advantages to be derived therefrom; third, the whole and all and every of his shares and interest in the Metropolitan Loan and Investment Company therein mentioned and described; fourth, the whole and every of his shares and interest in the City of New York Five Per Cent. Water Stock," &c. By another codicil, dated the 15th August, 1847, the testator directed his trust disponees or their foresaids to convey over to the child or children of his nephew, the then deceased Captain William Douglas Har-

¹ 1 Equity Rep. 35.

Harington v. Moffat.

ington, and to the child of the Reverend H. D. Harington, his nephew, who should be alive at the time of his (the testator's) death, equally among them, share and share alike, or the survivor of them, whom failing, to his own heirs whomsoever, the whole and all and every of his shares and interest in the Rock Life Assurance Company; and the testator, after referring to the shares and interest which he formerly had in the Metropolitan Loan and Investment Company, gave and bequeathed the whole of his shares and interest in the British Colonial Bank and Loan Company as therein mentioned. The testator, who was domiciled in England, died on the 14th September, 1850. At the date of the last mentioned codicil and the testator's decease, he was possessed of 200 shares in the Rock Life Assurance Society, and also of a policy of assurance effected with the said society for 1000*l.* upon his own life. The Rock Life Assurance Society was not incorporated, but consisted of a body of proprietors with a subscribed capital, and was regulated by a deed of settlement, dated the 20th August, 1807, and by certain laws, rules, and regulations, made in pursuance thereof. By the 118th clause of the deed of settlement it was provided, that every present or future proprietor of the company should keep on foot one or more assurance or assurances with the company, either on his or her own life, or on the life or lives of one or more approved nominee or nominees, amounting in the whole to 5*l.* at least on each of the shares held by him or her in the capital of the company, or should procure two or more approved substitutes, each of whom should keep on foot one or more assurance or assurances with the company, either on his or her own life, or the life or lives of one or more approved nominee or nominees, for any sum whatever, provided the whole amount of the sums to be assured to the substitutes were not less than double the sum, for which the proprietor procuring such substitute ought to have insured; and that every future proprietor should be allowed three calendar months from the time he or she should have become a proprietor, either by himself or herself, or by two or more such substitutes as aforesaid, to effect such assurance or assurances with the company. By the 125th clause of the deed it was provided, that executors, administrators, legatees, or next of kin of deceased proprietors, and assignees of bankrupt proprietors, should not be proprietors of the company in respect of the shares held by them in the company's said capital in any of those capacities, and should not be obliged to keep on foot any assurance with the company, and might in the manner and upon the terms thereafter mentioned sell the share so held by them. By the 126th clause of the deed it was provided, that every executor, administrator, legatee, or next of kin of a deceased proprietor, who should be desirous of becoming a proprietor in respect of the shares held by him or her in any of those capacities, should give notice in writing at the office of the company, of such his or her desire, and should describe in such notice his or her name and place of abode, and the number of shares in respect of which he or she was desirous of becoming a proprietor. By the 155th clause of the deed it was provided, that at the first court of directors after a bonus should have been declared,

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the bonus so declared should be divided into three equal parts: and, by the 156th and 157th clauses, provision was made for the addition of one third part of such bonus to the subscription capital stock, and for the distribution of the remaining two equal third parts of such bonus among such persons as should have assurances on foot with the company. The testator became a proprietor of the said society in 1814, and in the same year effected an assurance on his own life for the sum of 1,000*l.*; and at the time of his decease, bonuses to the amount of 824*l.* 16*s.* 8*d.* had been added to the policy. The question arose, whether the plaintiffs, who were the children of Captain W. D. Harington and of the Reverend H. D. Harington, were entitled to the policy and bonuses as well as to the shares in the Rock Assurance Company. The Master of the Rolls, on the 10th February last, held that the plaintiffs were not so entitled.

R. Palmer and *G. Simpson* for the plaintiffs, in support of the appeal, contended that, as the policies had been effected for the purpose of the proprietorship, there was such a connection between the shares and the policies as to render it necessary to include the policies in the words used by the testator. The exclusion of the policies would render the words "and interest" mere surplusage. The testator meant something beyond his shares in this company when he used the words "shares and interest," "and all the advantages to be derived therefrom;" and there was something beyond the shares to answer the words, namely, the policy. Aware as the testator was of the regulations of the company, he was desirous of giving to his legatees not only the shares, but also the means to obtain the qualifications necessary to hold them. They cited *Richardson v. The Bank of England*, 4 Myl. & Cr. 165; *Douglas v. Andrews*, 14 Beav. 347; and *Villebois v. Villebois*, before K. Bruce, V. C.

Lloyd and *Leach* for the defendants, who were entitled to the residue. The testator confined his bequest to that which belonged to him as a partner. He had himself put a construction upon the words which he had used by employing the same expression — "shares and interest" — when alluding to other companies in which no policies existed.

W. J. Bovill for the trustees.

R. Palmer in reply. It was the testator's intention to place the legatees in his own position as to these shares, and he desired them to retain the qualification necessary for them to hold the shares.

KNIGHT BRUCE, L. J. The burden of the argument in this case was upon the appellants, as alleging a particular and specific bequest in their favor, and, therefore, they were bound to show an intention in their favor. The respondents, who were the residuary legatees, and must have the property unless it were effectually given away from them, were under no such obligation. He thought that the appellants

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had failed in their case. How the matter would have stood if the testator had not in fact been a shareholder, or had said that he gave to the appellants all his share and interest in the stock and funds in the Rock Assurance Company, was immaterial, because the testator was a shareholder; and, as the testator had not said so, the bequest could not be considered as giving, in addition to his shares, the benefit of the policy which the testator had upon his own life, though in fact the same was made a charge upon the stock and funds of the company. It was not material that he was bound either to be a policy holder himself, or to procure some other person to be so by way of substitute for him. In the nature of things the benefit of the policy could not accompany the shares, as it became a demand payable at once on his death. As to what the testator said of "all the interest," and "all the advantages to be derived therefrom," that his lordship considered, if material at all, was only so as showing that the testator had no objection to a superfluity of words. By his shares and interests he meant his shares—the full benefit of the shares—his whole interest therein, and nothing else. The conclusion of the Master of the Rolls appeared, therefore, to be correct.

TURNER, L. J. This testator had given to the appellants "the whole and all and every of my shares and interest in the Rock Life Assurance Company, and all the advantages to be derived therefrom." It appeared that he had 200 shares in the company, and by the rules of the office every holder of shares in that company was bound to assure for 5*l.*, or procure another person to do so, for each share. The testator accordingly had an assurance for 1,000*l.*, and bonuses upon that assurance to the amount of 800*l.* The question was, whether the policy of assurance for 1,000*l.*, and the bonuses thereon passed to the legatees by the description of the "whole and all and every of my shares and interest in the Rock Life Assurance Company." If the testator had no other interest than the policy and bonuses, there could be little doubt that they would have passed by this description; for, though the policy was a claim against the company, and not an interest therein, still it gave a right to a sum of money out of the funds of the company, and in this sense would be an interest in the company, and would answer the description if there were nothing else to answer to it. But here the testator had the shares, and there were bonuses, part of which, according to the company's deed, were to be added to and form part of the shares; and the other part was to be added to and form part of the policy. The testator, therefore, must have used the words "interest in the Rock Life Assurance Company," in one of these senses, either to describe the interest in the policy, or referring to it as identical with "shares;" or the testator might have used it with reference to the bonuses. We must look to the context to see the sense in which he had used it. With reference to the sense first suggested, of its being used to describe the policy, the description, to say the least of it, was extremely inaccurate, for the policy was a claim upon the company, and not an interest therein; and it was very singular, if he wished to pass the policy, that he did not

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mention it. It was not, however, the fact, that he wished to pass the policy. But going further into the language of the will, as to the point whether the word "share" was used in this will as identical with the word "interest," his lordship thought that it appeared upon the will that that was the true meaning of the testator. He had given other property in the same terms, "all his share and interest in the Metropolitan Loan and Investment Society," "all his share and interest in the New York Five per Cent. Water Stock," "all his share and interest in the British and Colonial Bank and Loan Company;" and in the codicil there was a very remarkable expression as referred to the "shares and interest which I formerly had in the Metropolitan Loan and Investment Company," "I do hereby give the whole of my shares and interest in the British and Colonial Bank and Loan Company, if they shall be in my possession at my death." But there was a better clue to the expression in another part of the will, by which the testator in these terms referred to shares in the Reversionary Interest Society, directing the trustees "to hold the whole and all and every of my shares and interest in the Reversionary Interest Society, and to pay the interest, dividend, and annual produce or profit thereof to Elizabeth Margaret Douglas Money during her lifetime, and on her decease to convey the same with any interest, dividend, or produce which may have become due thereon, to the lawful child or children of the said E. M. D. Money by her present husband." There, therefore, the testator had clearly used the word "shares" as equivalent to "interest" which he had previously used. His lordship, therefore, thought it was evident that upon that clause, and also upon the expression which was used in the codicil, that the word interest was used simply as identical with a more full explanation of the word "shares." The third suggestion was that with reference to the bonuses upon the policies. It appeared, by the deed of the company, that the bonuses to be made by this company were to be divided into three parts, of which one third was to form part of the share. It was true that these bonuses, which were to be added to and form part of the shares, would have passed under the words "interest" or "shares;" and it was much more probable that he should have intended this, than to describe the policy by these words. Some reliance was placed upon the words "advantages to be derived therefrom." These words did not appear to affect the question in favor of the appellants. The words "to be derived therefrom," were prospective, and his lordship thought rather tended against the appellants. He considered, therefore, that the policy and bonuses did not pass.

In re Sharpley's Trusts.

*In re SHARPLEY'S TRUSTS.*¹

April 13, 1853.

Trustee Act—Chancery Practice Amendment Act.

Where some only of the parties interested, presented a petition under the Trustee Act, 1850, the court held that it could make the order under the 51st section of the Chancery Practice Amendment Act.

IN 1824, William Bullock, surrendered certain copyhold messuages, in the county of Chester, to secure payment of 400*l.* to Thomas Sharpley. Sharpley's interest became vested in his three granddaughters, who were duly admitted as tenants; and two of them were infants at the time of filing the petition. William Bullock, the surrenderor, died in 1841, leaving six children and two grandchildren, who represent as *cestuique trustent* his interest in the lands in question.

Certain persons having purchased these lands, it became necessary to obtain a re-surrender of them, and a petition was accordingly presented for that purpose by the trustees, by five of the *cestuique trustent*, and by the purchasers.

Renshaw, in support of the petition, referred to the Trustee Act, 1850, 14 & 15 Vict. c. 60, s. 37, which enacts, that any order concerning any lands, stock, &c., subject to a trust, may be made upon the application of any person beneficially interested in such lands," &c. Now, although there were some only of the *cestuique trustent* before the court, yet, the court had power to make the order in absence of the others, under the 15 & 16 Vict. c. 86, s. 51, which gives the court power to adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen.

KINDERSLEY, V. C., conceived that he had power under 15 & 16 Vict. c. 86, to make the order.

Order accordingly.

¹ 1 Equity Rep. 40.

Beaufort v. Patrick.

DUKE OF BEAUFORT v. PATRICK.¹

March 12 and 14, and April 16, 1853.

Joint-Stock Company—Agreement with Lessees—Reversioner—Compensation—Acquiescence.

A granted a lease of land to B in 1779. In 1794, an act was obtained for a canal, part of which was to pass over the land demised, and to be made by C. On the neglect or refusal of C, or of the other authorized persons, to complete the respective portions of the canal within two years, the defaulter was to pay 500*l.* per annum until completion. C's portion of the canal was not completed within the time specified, but was subsequently made, under an arrangement between C and B, the lessee. No compensation was made to A in respect of his reversion, but all the acts of C were done with the consent of the proprietors of the lands of whom A was one. In 1783, A mortgaged his reversion, which was sold in 1794, to D, under a decree of the court. The particulars of sale, contained a statement that the canal was to pass through the land. In 1844, the lease to B expired, and the devisees of D brought an action of ejectment against C, to recover the land covered by the canal, and obtained a verdict.

In a suit by C against the devisees of D, for an injunction to restrain further proceedings in the action, and for a conveyance to C:—

Held, 1st, That the time for making the canal was unlimited; subject, however, to the payment of 500*l.* per annum, after the expiration of the specified time until completion. Secondly, That A had acquiesced, and was not entitled to the land. Thirdly, That the devisees of D were not bound by the acts of A; but that D, having purchased with the knowledge that the canal was to remain for the benefit of the public, his devisees could not interfere with this easement. But, fourthly, That they were entitled to compensation for the real, and not the fictitious, value of the land at the time the reversion fell in, with interest at 4 per cent. from that time, and on payment the devisees were to execute proper conveyances to C.

By indenture of lease, dated 15th November, 1779, John Bennett Popkin demised to John Morris certain copyhold lands and hereditaments, within the Fee of Trewyddfa, in the county of Glamorgan, for a term of sixty-five years. Morris soon afterwards erected copper-smelting works, and for the purposes of his business cut a canal partly through the demised lands.

In 1793 a company was formed for the purpose of making, under authority of parliament, a canal, to be called the Swansea Canal, which was to pass through the lands comprised in the lease to Morris. In 1794 the act passed.

By the 12th section of the act, the then Duke of Beaufort, to the exclusion of the company, was empowered and required at his own expense to make so much of the canal as passed through the Fee of Trewyddfa, of which he was lord, and all the necessary powers were given to the duke for this purpose.

Section 14th fixed the times within which the different portions of the canal were to be completed, and provided that if the company or the duke "shall neglect or refuse to make and complete the said canal within the times so limited as aforesaid, then and in such case the

¹ 1 Equity Rep. 41.

said party so neglecting or refusing shall pay to the other the sum of 500*l.* per annum, until the same shall be made and completed, and so in proportion for any less time than a year.

Section 15th empowered the duke to take tolls.

Section 44th enacted that the commissioners appointed for the purpose of settling differences between the company and the land-owners, should not receive complaints for injury or damage, unless application should have first been made to the company within three calendar months next after such injury or damage.

By an indenture, dated 9th day of August, 1797, and made between the then Duke of Beaufort of the one part, and Morris and his partners (Elliott, Lockwood & Co.) of the other part, it was agreed that the duke, and Elliott, Lockwood & Co., during the residue of the term of ninety-nine years, should be jointly interested in making and maintaining the canal through the said Fee of Trewyddfa, and that the canal already made by Morris, should be widened and improved, so as to form part of the said intended canal.

In 1797, the Swansea Canal, including that portion within the Fee of Trewyddfa, was opened to the public.

In the year 1783, Popkin mortgaged an estate called the Forest estate, which included the copyhold lands and hereditaments comprised in the lease to Morris, to John Parry in trust for Albany Wallis.

In the years 1793 and 1794, orders were made, in a suit against Popkin, for the sale of the Forest estate. In 1800, John Calland was declared the purchaser, and having paid the purchase-money was let into possession. The particulars of sale under which Calland bought, were prepared after the canal act had passed, but before the canal had been made, and they contained a statement that the canal would be made through the estate. Calland died in 1803, having devised the estate to the defendants. The purchase was finally completed, in pursuance of an order made in the suit, dated the 22d of February, 1822, and on the 27th December, 1827, the customary heirs of John Parry surrendered to the use of Calland and Hawkins "all and singular, the customary messuages, lands, and hereditaments, surrendered by John Bennet Popkin, to the use of Albany Wallis, his heirs and assigns, at a court holden for the said manor on or about the 4th of April, 1783." Popkin died in 1804.

In the year 1808 the agent of the duke wrote and sent a letter to the solicitors of the devisees under Calland's will, in which the following passage occurs:—"If you can give me any information upon the subject of the consideration to be paid by the Duke of Beaufort for the land taken from Mr. Popkin's property, it will be very acceptable, as the business must now be brought to a conclusion, either by a settlement between the parties interested, or by calling out the commissioners."

The lease to Morris expired in 1844, and soon after an action of ejectment was brought against the duke by the devisees of Calland, (the first four defendants to this suit,) to recover so much of the land and banks of the Swansea Canal as were situated within certain boundaries and within the Fee of Trewyddfa. The verdict upon

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the trial of the action was in favor of the plaintiffs, subject to a special case to be turned into a special verdict. The case was argued in the Court of Exchequer, when the plaintiffs were held to be entitled to recover in the action.

In the special case it is stated that no payment or other satisfaction was made or agreed to be made to the owners or proprietors of the lands taken for the purposes of the canal; but every thing that was done by the duke, was done with the full consent and approbation, and in accordance with the wishes of such owners and proprietors; that no record of any conveyance or other proceedings whatever, taken under the said act, of any lands taken throughout its course, was to be found in the office of the clerk of the peace, except the maps and book of reference deposited by the projectors of the canal before the passing of the act, which showed that the canal was to pass through the lands in question, described as the copyhold property of John Bennett Popkin, in the occupation of John Morris.

In 1851 the present suit was instituted by the Duke of Beaufort against the devisees of Calland; the first tenant in tail of the duke's estates, and the Attorney-General, praying for an injunction to restrain defendants, the devisees of Calland, from further proceeding in the action of ejectment, and from commencing or prosecuting any other proceedings at law against the plaintiff for recovering possession of the premises, for a conveyance from the devisees to the plaintiff, he offering to pay to the defendants any compensation which might be due under the provisions of the Swansea Canal Act.

The *Solicitor-General*, *W. M. James*, and *Cracknell*, appeared for the plaintiff.

Campbell, for the Marquis of Worcester.

Roundell Palmer and *Pemberton*, for the defendants, the devisees of Calland.

Wickens, for the Attorney-General.

The arguments sufficiently appear in the judgment. The following cases were cited: *Pilling v. Armitage*, 12 Ves. 78; *Dann v. Spurrier*, 7 Ves. 230; *Clare Hall v. Harding*, 6 Hare, 273; *Powell v. Thomas*, 6 Hare, 300; *Clavering's case*; ¹ *Duke of Devonshire v. Eglin*, 14 Beav. 530; s. c. 7 Eng. Rep. 39.

THE MASTER OF THE ROLLS. The question argued before me is, whether the facts of this case do not raise an equity which this court will enforce, by preventing the defendants from exercising their legal right; and if so, whether the court will, in so restraining the defendants, impose upon the plaintiff any, and if any, what, conditions; in other words, I am of opinion that the question I have to determine

¹ Referred to in *Jackson v. Cator*, 5 Ves. 688.

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is, whether there has been such an appropriation of this land to the public as binds the defendants in equity from disputing it; and if this be established, whether the defendants are entitled to any compensation; and if any, on what principle.

The plaintiff contends, that inasmuch as the lands sought to be recovered were included in the maps and books of reference deposited with the clerk of the peace, and were part of the lands authorized by the act to be taken, and as every thing that was done by the duke is found to have been done with the full consent and approbation and in accordance with the wishes of the owners and proprietors, which class includes Popkin, the owner of the reversion of the lands in question, he must be taken to have dedicated this land to the public for the purpose of this undertaking, and that this will bind the defendants, who claim under him. It is contended, also, on the part of the plaintiff, that in no view of this case are the defendants entitled to recover possession of the land; for that even if it be held that Popkin did not dedicate the land to the undertaking, still, that the only claim which the defendants can enforce is, to be paid a fair and reasonable compensation. All presumption of compensation arising from length of time, is excluded by the fact found by the special verdict, that no payment or other satisfaction was made, or agreed to be made, to the proprietors of the lands in question.

The defendants contend, first, that there has been no appropriation to the public at all of this portion of the canal; secondly, that nothing which has taken place has been done in such a manner as to affect Popkin; thirdly, that even if Popkin be bound, the defendants do not claim under, and are in no respect affected by the acts of, Popkin.

On the first point, it is urged that the canal through the Fee of Trewyddfa was not made, in fact, under the authority of the act, for that the statute, by the 14th section, required that the canal should be made within two years from the passing of the act, and limited the time for making it to that period; that consequently the compulsory powers of the act ceased on the expiration of that time, and the rest of its provisions have no bearing on the question at issue, and that as the canal was made, so it can only be maintained, if at all, by arrangement between the duke and the proprietors of the lands. I am, however, of opinion that this is not the true construction of the 14th section, but that the final part of the section controls the time limited by the previous part. It could not have been the intention of the legislature to impose payment of a perpetual annuity of 500*l.* in case the canal was not completed in two years, which would be the result of holding that when two years had expired, it could not afterwards be made under that act. In my opinion the real meaning is, that the time is unlimited; but with this proviso, that if it be not completed within two years, a sum shall be paid, by way of penalty for the excess beyond that period, at the rate of 500*l.* per annum.

On the question whether Popkin was bound by what took place, it is contended that he has stood by and encouraged the acts, and cannot now complain or interfere with the enjoyment of that which he has permitted to be done. The defendants do not dispute this

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general proposition, but draw a distinction to be found in the cases of *Clare Hall v. Harding*, 6 Hare, 273, and *Pilling v. Armitage*, 12 Ves. 78, where it is held that the encouragement given to the lessee will not affect the reversion, or give the lessee, or any one claiming under him, any additional rights because he knew what his title and his length of tenure were. The permission, therefore, given by the landlord to the lessee cannot bind or affect his reversion. I concur in this principle, but I am of opinion that it is not strictly applicable to this case. A cut of private canal had been made by the lessees, with the consent of Popkin. This could not bind his reversion; but this canal was not of the dimensions required by the act, although it was, when improved and widened, to form a portion of it. Popkin had full knowledge of the canal act, and every thing relating to it. His name is mentioned as a proprietor; and it is also provided that his right and interest in the Fee of Trewyddfa shall not be altered or lessened except so far as is necessary for making and using that part of the canal which was to pass through and over that fee. This extension and improvement of the canal through Trewyddfa also took place by an arrangement between the duke and the lessees for the purpose of making it correspond with the rest of the canal; and an arrangement was made between them as to the division of the tolls, which was not in accordance with, or authorized by, the lease from Popkin. It is expressly found by the special verdict that every thing done by the duke was with the consent of the owners and proprietors, of whom Popkin was one. It would, therefore, be contrary to the principles of Equity, if I were to confine this consent to the arrangement between Popkin and his tenant, by which the original cut was made, and to permit Popkin, the owner of the property, who had sanctioned the improvement and widening of the canal through his land, so as to make it correspond with the dimensions required by the act, and who had known and approved the division of the tolls, which could only be levied by the authority of that act, to assert that he meant this permission to be temporary only until the lease to one set of the parties to the agreement had concluded, and although the act pointed to permanence, to allow him to insist on a right to destroy that canal, and put an end to the very thing of which he had approved. I am of opinion, therefore, that so far as Popkin is concerned, and so far as regards any persons claiming through him, he and they must be held bound to this extent, that he is not entitled to obtain possession of the land covered by the canal, or to interrupt or interfere with the use thereof.

The next question is, whether the defendants are bound by the acts of Popkin, and if not, whether they are affected by any separate and independent circumstances, which make it inequitable that they should be allowed to exercise their legal rights and obtain possession of the land covered by the canal. I am of opinion that the defendants are not bound by the acts of Popkin, except so far as it appears that their testator had a knowledge of those acts. They are clearly bound by every thing that bound their testator, Calland, and I think Calland could not, after his purchase, have contended, with success, that he

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was entitled to resume the land occupied by the canal after the expiration of the term of sixty-five years. He bought under particulars of sale, which expressly stated the intention to make it. He bought at a time when it had actually been completed, and therefore when he knew, or, according to the rules of this court, must be taken to have known, that the canal was in existence. I am of opinion that he bought with the knowledge, and subject to the implied condition, that the canal was to remain, and was to be used for the benefit of the public for ever thereafter, and that neither he nor his devisees, nor those who represent them, can prevent the enjoyment of this easement in future.

On the subject of compensation I have had more difficulty. The finding in the special verdict and the letter of the duke's agent in January, 1808, precludes the presumption, which otherwise might have arisen, of a conveyance of the reversion, and that Calland bought in the belief that such had been the case. But not merely does the verdict negative any agreement for payment of compensation to the owner of the reversion, and not only does the letter of the duke's agent show that the question of compensation was then under discussion between the devisees of Calland and the duke; but the surrender made under the order of 1822 includes the whole of the land mentioned in the particulars of sale published before the canal was made, and the whole surrender by Popkin to Wallis in 1783, and including, therefore, the land occupied by the canal. Although, therefore, I am of opinion that the defendants cannot be allowed to obtain possession of that portion of the canal, and to interrupt the traffic upon it yet they must be entitled to receive some fair and reasonable compensation for their interest in the land. That compensation cannot, I think, be ascertained under the powers of the act, for the 44th section limits the time within which complaints for injury are to be made to the commissioners, and I think it would not now be possible to call out the powers of the commissioners. I must, therefore, myself determine on what principle the compensation is to be assessed; that is, whether the plaintiff ought to pay what the value of the reversion was in 1797, when possession was taken under the act, or whether the value when the reversion fell in should be ascertained. I think the compensation cannot be on the principle of what the value of the reversion was in 1797. The duke, under whom the plaintiff claims, might then have ascertained that value under the powers of the act, and have paid or tendered it to the persons entitled. He cannot properly obtain any advantage by having abstained from so doing. He has, in fact, taken and paid for, either in money or by the arrangement of 1797, the residue of the lease of 1779, so far as it comprised land covered by the canal; but he has not paid for the reversion subject to that lease, and he has waited for this purpose till the lease has expired. Until that period had arisen, there was no mode by which the purchasers of the reversion could have enforced payment. If, under the 44th section, they were bound to complain within three months after the canal was completed, they could not have proceeded by injunction, because they had sanctioned the mak-

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- ing of the canal, and after it was completed the use of it would not have been waste. It is true that they might, within three months after completion of the canal, have applied to the commissioners for compensation, and so also might the duke. Possibly, as was suggested at the bar, the smallness of the sum prevented them mutually from having recourse to this process; but the same principle must regulate the decision of the court, whether the value of the reversion be large or small.

During the whole of the time that has elapsed, the money which ought to have been applied in paying the owner of the reversion has been in the pocket of the duke, and those who claim under him, and during the whole of that time also the reversion has been gradually increasing in value. The plaintiff cannot, I think, be charged on the principle of compound interest; but he has waited till the property has ceased to be reversionary, and is therefore increased in value as it now exists. I am of opinion, that the plaintiff must pay for the value of the land at the time when the reversion fell in. At the same time, I am of opinion, that the defendants are entitled only to be paid the fair and reasonable value of the land, as if the same were not wanted for the purpose of the canal; not a fanciful amount, based upon calculations of possible advantages not in existence, or upon any supposed diminution of advantage to the rest of their property, under what is usually called severance. I propose to require the plaintiff and defendants to lay before me evidence of the value in September, 1844, when the term expired. When this is done, either by agreement between the parties, or by my decision on the evidence laid before me, I will make a decree ordering that, upon payment of the sum so ascertained, with interest at 4 per cent. from September, 1844, the defendants are to execute all proper conveyances. The injunction already granted to be continued. As each party has claimed more than in my judgment he is entitled to, I shall make no order as to costs; each party must pay his own. I do not intend to deal with the question of costs at law. I do not relieve the plaintiff from those. The plaintiff, however, must pay the costs of the attorney-general.

HAWKINS v. GARDINER.¹

May 9, 1853.

Practice — Costs — Dismissal of Bill — Defendants parting with Interest — Disclaimer.

In a case in which, after the bill was filed, two of the defendants, having parted with their interest in the subject-matter of the suit to two co-defendants, without acquainting the plain-

¹ 1 Equity Rep. 49.

Hawkins v. Gardiner.

tiffs therewith, joined in an answer disclaiming and claiming to be dismissed with costs, and the plaintiffs then amended their bill, omitting the names of the two disclaiming defendants, and afterwards served them with a notice of motion to dismiss the bill without costs, an order was made pursuant to the notice of motion.

THIS was a motion on behalf of the plaintiffs, that the bill might be dismissed, as against the defendants Ellen Hooman and Jane Hooman, without costs.

The late Thomas Wood, of Wellington, who died in 1811, was the trustee of a settlement made previous to the marriage of Mr. and Mrs. Oland. Among other property comprised in the settlement, was a sum of 630*l.*, the interest of which was to be paid to Mrs. Oland for her life. Mrs. Oland died in 1846, and the parties beneficially entitled in remainder, to the sum of 630*l.*, filed their bill in April, 1852, against the parties claiming the late Thomas Wood's real estates under his will, for the purpose of obtaining payment of that sum out of those estates. On the 29th of June, 1852, two of the defendants, Ellen Hooman and Jane Hooman, who were interested under the will of Thomas Wood, conveyed their interest in the lands and hereditaments devised by the testator T. Wood to their co-defendants, William Nicholas Marcy and William John Slade Foster, on the 2d of August, 1852. Ellen Hooman and Jane Hooman, put in their answer, in which they stated that they had conveyed to the two defendants W. N. Marcy and W. J. S. Foster, their respective interests in the lands and hereditaments devised by the testator T. Wood; and they thereby disclaimed all interests in the matters in question in the suit, and thereby claimed to be thence dismissed with costs.

After the answer of Ellen Hooman and Jane Hooman was put in, the bill was amended by omitting their names.

Elderton, in support of the motion, relied on *Gabriel v. Sturges*, 5 Hare, 97.

Renshaw, for Ellen Hooman and Jane Hooman, contended that they were entitled to their costs.

THE VICE-CHANCELLOR said that, as he understood, since the bill had been filed, two of the defendants had disposed of their interest under the will of the testator, T. Wood, to two of their co-defendants interested under the same will, and the court was applied to in order to get rid of the two former as defendants without payment of costs. He did not think it was an irregular or an improper application, but it was an unusual one. Instead of joining in an answer, the two disclaiming defendants should have made the plaintiffs acquainted with the circumstance of their having parted with this interest under the testator's will to two of their co-defendants since the bill was filed; they should not have put in an answer. It was obvious the plaintiff could not have known what had happened; and it was the duty of the defendants, Ellen Hooman and Jane Hooman, to have put the plaintiff in such a situation as to have at once dispensed with them as parties to the suit. Instead of this, an answer had been

Rabbeth v. Squire.

put in by them, disclaiming any interest in the matters in question in the suit, and asking that the bill might be dismissed as against them with costs. But the plaintiffs had taken a course which was not quite proper; for they had struck these individual defendants out of the record, by amending their bill, without in any way dealing with them as defendants, except by serving them with a notice of the present motion. In this respect the plaintiffs had pursued an irregular and precipitate course. But as it was perfectly clear the disclaiming defendants ought to have informed the plaintiffs that they had parted with their interest under the testator's will to two of their co-defendants, since the bill was filed, instead of putting in their answer, he should make an order dismissing them as defendants without costs. Vide *Knox v. Brown*, 1 Cox, 359; 2 Bro. C. C. 186.

RABBETH v. SQUIRE.¹

April 30, 1853.

Practice — Commencement and Heading of Answer.

An answer may be filed, notwithstanding the heading does not contain all usual words.

Simpson applied for leave to file an answer, which the clerk of records and writs had refused to receive, on the ground that it was irregular in form. The irregularity was that the answer commenced, "The answer of the defendant E. Squire," but omitted the usual words "to the bill of complaint of the said complainant." He contended that these words were unnecessary. The answer was headed in the suit, and it therefore sufficiently pointed out the bill to which it was an answer.

THE VICE-CHANCELLOR said the answer might be filed. It was shown by the heading what bill it was an answer to, and he did not see why the defendant might not be indicted for perjury upon it, if it was false.

¹ 1 Equity Rep. 50.

Waldron v. Frances.

WALDRON v. FRANCES.¹

April 29, 1853.

Costs — Administration — Legatee's Suit — Insufficient Funds.

Where the fund is insufficient, a legatee filing a bill on behalf of himself and all the other legatees to have the estate administered, is entitled to costs as between solicitor and client.

THE bill in this case had been filed by a legatee for the purpose of having the testator's estate administered. The estate proved insufficient for payment of debts and legacies. The case now came on on further directions and costs, and the only question was, whether the plaintiffs should have their costs as between solicitor and client.

Chandless and *Eddis*, for the executors, contended that the rule which applied to creditors suing did not apply to legatees. *Western v. Clowes*, 15 Sim. 610; *Wroughton v. Colquhoun*, 1 De G. & Sm. 357.

Hall, for the plaintiff, contended that in all the cases where costs as between solicitor and client had been refused, it had been on some particular ground. In *Wroughton v. Colquhoun*, the plaintiff was allowed his costs as between solicitor and client, so far as the proceedings taken had benefited the estate.

[THE VICE-CHANCELLOR. Can you show me any precedent for giving costs as between solicitor and client. It seems difficult to understand why any difference should be made between a creditor suing on behalf of himself and all other creditors, and a legatee on behalf of himself and all other legatees, but in the absence of authority I can only give costs as between party and party.]

Hall afterwards mentioned the case of *Cross v. Kennington*, 11 Beav. 86, as being precisely in point.

Chandless distinguished that case on account of the legacy being a charge on the real estate.

THE VICE-CHANCELLOR said he should act upon it, and give the plaintiff his costs as between solicitor and client.

¹ 1 Equity. Rep. 52.

 BRENNAN v. PRESTON. — PROBERT v. PRICE.

BRENNAN v. PRESTON.¹

April 28, 1853.

Practice—Evidence—Appointment of Special Examiner.

Under special circumstances, the court will appoint an examiner to take the evidence of witnesses in London.

Rolt and *J. V. Prior* applied on behalf of a defendant in the cause, under 15 & 16 Vict. c. 86, s. 31, for the appointment of a barrister to take the evidence of the witnesses in London. There were a great number of witnesses to be examined, the plaintiff was under terms to expedite the cause, and no appointment could be obtained in the examiner's office before the 1st of June.

Follett and *James*, on behalf of the plaintiff, opposed the motion, on the ground of the extra expense which would be occasioned. There was no instance of such a thing having ever been done. And even if it could be done there was no sufficient reason for it in the present case, as both parties were by a previous order to be at liberty to file affidavits.

THE VICE-CHANCELLOR said, that under the special circumstances of the case, the cause having been ordered to be expedited, and it being impossible to get an appointment before the examiner, he thought the application might be granted. The whole scope of the act was that evidence should be taken *vivâ voce*.

 PROBERT v. PRICE.²

April 25, 1853.

Practice — Mortgagor and Mortgagee — Decree for Sale instead of Foreclosure.

Under statute 15 & 16 Vict. c. 86, s. 48, the court will not make a decree for sale, instead of foreclosure, without the consent of the mortgagor, except under special circumstances.

THIS was claim for foreclosure.

Field, on behalf of the plaintiff, asked for a sale under the powers given to the court, by the 15 & 16 Vict. c. 86, s. 48, which enacts "that it shall be lawful in any suit for the foreclosure of the equity

¹ 1 Equity Rep. 51. •
• ² 1 Equity Rep. 51.

Re Norman's Trust.

of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent encumbrancer or of the mortgagor, or any person claiming under them, to direct a sale of such property instead of a foreclosure of such equity of redemption on such terms as the court shall think fit to direct."

Villiers opposed the application on behalf of the owner of the equity of redemption. No case was shown for a sale, the only evidence was the proof of the mortgage, and that the debt was still due.

THE VICE-CHANCELLOR said, the statute gave a discretionary power to the court to direct a sale instead of a foreclosure, but when the plaintiff was proceeding without the consent of the mortgagor he must make out a case for departing from the usual course. Here there was nothing to call for any departure from the general rule, and he could only make the common foreclosure decree.

Re NORMAN'S TRUST.

May 6, 1853.

Settlement — Next of Kin — Married Woman — Without being married.

By a marriage settlement the trusts of a fund were declared to be as to one moiety for the benefit of the children, after the death of the parents; and as to the other moiety after the death of the wife, if she died in the lifetime of the husband, as the wife should appoint, and in default of appointment for such persons as at the death of the wife would have been entitled to the residue of her personal estate, "in case she had died intestate and without being married." The wife died in her husband's lifetime, leaving two children:—

Held, that the children were entitled to the second moiety.

THIS was an appeal from the decision of Vice-Chancellor Kindersley upon a petition presented under the following circumstances. By a settlement dated the 22d April, 1842, and made on the marriage of George Bethune Norman and Anna Elizabeth Norman, it was declared that the trustees thereof should stand possessed of a sum of 19,469*l.* consols then lately standing in the name of A. E. Norman, upon trust as to one moiety thereof and the interest thereon, to pay the interest to A. E. Norman during her life, and, after her decease, upon trust for G. B. Norman for life, with remainder in trust for such of the children of G. B. and A. E. Norman as they or the survivor of them should appoint; and, in default of such appointment, then upon trust for the children as therein mentioned; and in case there should be no child, then upon trust for the survivor of them, the said George Bethune Norman and Anna Elizabeth Norman; and as to the said

Heath v. Lewis.

gation Mrs. Martha Bentick has conferred on me by her great attention and care, pay to the said Mary Ann King the sum of 2l. 10s. per calendar month (making 30l. a year,) during the term of her natural life, if she shall so long remain sole and unmarried; the first payment thereof to be made at the end of one calendar month after the decease of the said Martha Bentick." The testator died on the 28th August, 1843; Martha Bentick died on the 3d July, 1848, leaving the said Mary Ann King her surviving and unmarried. On the 4th November, 1848, Mary Ann King was married to Richard Carr Turnbull. In this cause, which now came on for further directions, a question arose upon the construction of the will as to the right of Mr. and Mrs. Turnbull to the annuity subsequent to her marriage.

Chandless and *Caldecott* appeared for the plaintiffs.

Elmsley and *Younge*, for the defendants.

Greene, for Mr. and Mrs. Turnbull, contended that this was a condition in restraint of Marriage, and referred to the observations of Wigram, V. C., in *Morley v. Remboldson*, 2 Hare, 570, and the cases there cited. It was to be observed, that in the present case there was no gift over in case of marriage, upon which circumstance many of the decisions had been made to depend. *Lloyd v. Lloyd*, 2 Sim. n. s. 255; s. c. 10 Eng. Rep. 139; *Marples v. Bainbridge*, 1 Madd. 590; and *Re Dickson's Trust*, 1 Sim. N. S. 37; s. c. 1 Eng. Rep. 149; *Webb v. Grace*, 2 Ph. 701, which was decided by Lord Cottenham, was clearly distinguishable from the present case.

KNIGHT BRUCE, L. J., said, that it must be agreed on all hands that, by the English law, it was competent for a man to give a single woman an annuity "until she should die or be married, whichever of those two events should first happen." All men agreed that if such legatee should marry, the annuity would thereupon cease. But the proposition, — if it were true, and he did not deny its truth, — was not creditable to the English law, that if a man gave an annuity to a single woman for life, but afterwards declared that if she should marry the annuity should be forfeited, the proviso was void, and she might yet marry as often as she pleased, and retain her annuity. So extraordinary was the state of the law said to be. The question before the court was, to which of the two classes the gift in this will belonged, it being the gift of an annuity to a single lady, "during the term of her natural life, if she should so long remain unmarried;" the language being the technical and proper language of limitation as distinguishable from condition, long adopted by the English law, and familiar to us all. Both upon principle and the authorities his lordship was of opinion, that this was a limitation as distinguished from a condition; that it belonged to the former class he had mentioned; and that the annuity ceased when the lady married.

TURNER, L. J., said that there were two constructions which might

In re Rye's Settlement.

be put upon these words; it might either be a gift to her for life, defeated by her marriage, by condition, or it might be a gift to her so long as she remained unmarried; that was, for life if she were so long unmarried; and the question, therefore, was one of intention. There could be no doubt as to what was the intention of the testator in the present disposition, for from the former part of the will the gift appeared to have been in consideration of the care and attention the testator had received from Mrs. Martha Bentick. It was clear, therefore, he did not intend that the annuity should be absolutely for life; and the intention must govern the case.

In re RYE'S SETTLEMENT.¹

November 12 and 13, 1852.

Will — Remoteness — Failure of Issue.

By indenture of marriage settlement, lands were settled to J. J. R. for life; remainder to trustees for securing a jointure and certain portions; remainder, in default of issue male of J. J. R. in that marriage, to J. J. R. in fee. By will, dated 1816, J. J. R. devised all the said hereditaments, "in the event of his death without leaving issue by his said wife," to his wife for life; remainder to P. R. for life; remainder to trustees, to sell, and pay to E. (the petitioner,) 4,000*l.*, at twenty-one or marriage, "and to be a vested interest then, though payment might not be possible till after the deaths of his wife and P. R.; and to pay and divide the residue among such of the other children of P. R. as should be living at his decease, or then dead leaving issue, the issue of any such dead child to take the parent's share:—

Held, that the gift over, in the event of the testator's death without leaving issue, was not void for remoteness.

Where the ulterior limitations in a testator's will depend on his death without leaving issue, and among those ulterior limitations there are provisions which cannot refer to a general failure of issue, then the failure will be taken to be a failure of issue living at the death of the testator, and not a general failure of issue.

THIS was a petition for the payment out of court of a sum of 4,000*l.*, part of a larger sum which had been paid into court under the Trustee Relief Act. By indenture of settlement, dated the 21st August, 1797, (the settlement on the marriage of Joseph Jekyll Rye and Miss Clavering,) certain hereditaments at Culworth and Morton Pinckney were limited to the uses therein mentioned, being for Joseph Jekyll Rye for life, and for securing a jointure to his wife and portions to younger children, with remainder, in default of issue male of that marriage, to Joseph Jekyll Rye in fee. There never was any issue of the marriage, and on the 25th May, 1816, the said Joseph Jekyll Rye, by his will, reciting the settlement, declared that, "in the event of his death without leaving issue by his said wife," he gave and devised all his said hereditaments at Culworth and Morton Pinck-

¹ 16 Jur. 1128; 22 Law J. Rep. (N. S.) Chanc. 345.

In re Rye's Settlement.

ney to his said wife, Dorothy, for life; with remainder to his brother, Peter Rye, for his life; with remainder to trustees, upon trust to sell the said lands, and to pay the money arising by such sale, and by the rents and profits of such premises in the mean time, in manner therein mentioned, namely, to pay to the testator's niece, Eleanor, daughter of Peter Rye, (now the petitioner Eleanor Elwes,) 4,000*l.* at twenty-one years or day of marriage, whichever event should first happen, and to become a vested interest then, though payment might not be possible till after the deaths of the tenant for life, his wife and brother; and to pay and divide all the residue of the said moneys arising from such sale or sales as aforesaid, and the rents and profits of the said premises in the mean time, unto and amongst all the other children of the said Peter Rye who should be living at his, the said Peter Rye's death, or born in due time afterwards, equally to be divided among such other children, share and share alike; and in case any one or more of such children should die without issue before his, or her, or their part or parts should become payable as aforesaid, then, and in every such case, as well the original part or parts of such child or children so dying without issue, as also all and every such sum or sums of money (if any) as should fall to them or any of them, as the part or parts of any other or others of them who were dead before without issue, should go to the surviving child or children of the said Peter Rye, and the issue of such child or children as should be then dead leaving issue, and should not go to his, her, or their executors and administrators; but the issue of any such deceased child should not have or be entitled to a larger share among them than their parent would have been entitled to. The will contained a formal clause enabling the trustees to give good receipts and discharges. Joseph Jekyll Rye died in 1819. There never was any issue of his marriage, and Peter Rye was his heir at law. Dorothy Rye died in 1825; Peter Rye died in 1851. All the children of Peter Rye predeceased him, except the said Eleanor Rye, the petitioner, who in the year 1826 married the petitioner Cary Charles Elwes. In 1852 the estates were sold, but, upon the completion of the purchase, doubts arose as to the trusts of the will of Joseph Jekyll Rye, whether they were not expressed to take effect upon an indefinite failure of issue of the testator, and therefore void. The money, therefore, amounting to upwards of 15,000*l.*, was paid into court, and this petition was presented, praying for payment of the sum of 4,000*l.* out of the moneys in court, and to have the residue of the sum in court, after payment of all costs, transferred to a separate account, to be entitled "The Trust Account of the Residue of the Sales Moneys under the Will of Joseph Jekyll Rye."

Rolt and Greening, for the petition. In *Lytton v. Lytton*, 4 Bro. C. C. 441, a reversion was given by the testator on a general failure of issue male of his body, and it was held to be a good devise. The case of *Wellington v. Wellington*, 4 Burr, 2165; 1 W. Bl. 645, was put on the special circumstances of the case. *Lady Lanesborough v. Fox*, Cas. t. Talb. 262, is clearly in our favor. So, too, *Bankes v. Holme*, 1 Russ.

In re Rye's Settlement.

394, note; S. C. Sugd. Law of Real Prop. 353. *Doe v. Duesbury*, 8 M. & W. 514, is also very strongly in favor of the same view.

[TURNER, V. C. There the testator would be presumed to have considered that T. B. would survive him.]

Glasse and George Lake Russell, for parties claiming under Peter Rye, cited *Eno v. Eno*, 6 Hare, 171; s. c. 11 Jur. 746. *French v. Cadells*, 3 Bro. P. C. 257, is no authority against this view. *Southby v. Stonehouse*, 2 Ves. sen. 610.

Lonsdale, for parties entitled to prior charges.

Rolt, in reply, cited *Vanderplank v. King*, 3 Hare, 1; s. c. 7 Jur. 548, and *Williams v. Teale*, 6 Hare, 239.

November 13. TURNER, V. C., (after stating the facts, and noticing that the limitation over in the settlement was on failure of male issue, but in the will was general, being a gift over in the event of dying without leaving issue by his wife.) The question is, whether the gift of 4,000*l.* is void for remoteness, as depending on a general failure of issue of Joseph Jekyll Rye. It was argued that the limitation was good, because the failure of issue would be an event ascertained at the death of the testator; and I think this is the true construction of the will. Where the ulterior limitations in a will depend on the death of the testator without leaving issue, and among those ulterior limitations there are provisions which could not refer to a general failure of issue, there the period will be the death of the testator, and not a general failure. It is a question of intention, and the general context of the will is the key to explain the intention. Without laying any stress on the limitations for life to the wife and brother of the testator, it is to be observed here, that the legacy, the subject of this petition, is to be paid on the death of the wife and brother, and I think this is inconsistent with the notion of the whole limitations being intended to depend upon a general failure of issue. I was much pressed in argument to give an opinion upon the general question, what would be the result if the testator's issue fail before his death, assuming the limitations to be by the terms of the will dependent on the general indefinite failure of issue? But I do not feel at present enabled to do so, because the argument has not been full enough, and I do not think the question is raised here. With reference to the cases before Sir J. Wigram, V. C., I may remark, that the testator may look beyond the state of things at the time of his decease. There are cases which have not been examined, and which appear to be in direct conflict on the subject. I allude to the cases of *M Kinnon v. Peach*, 2 Kee. 555, and *Harris v. Davis*, 1 Coll. 416. I shall therefore, at present, not go into the general question.

Scorey v. Harrison.

— v. —.¹

December 1, 1852.

Practice — Motions to Suppress Depositions, and to take Evidence orally, under the 15 & 16 Vict. c. 86.

BOVILL moved, by consent, that depositions taken during the Long Vacation might be suppressed, and that both sides might proceed to examine witnesses orally under the new statutes.

TURNER. V. C. Applications by consent, for suppression of depositions, ought in general to be made at chambers; but as this application is besides to take the evidence orally under the new practice, it was proper to make the application in court.

SCOREY v. HARRISON.²

December 18 and 20, 1852.

Locality of Debt — Domicile.

A promissory note due to a testator domiciled in England, by a person resident at the Cape, passes by the words "property I shall leave in the Colony."

JAMES SCOREY, the testator in this cause, master mariner, by a codicil to his will, dated the 9th June, 1847, gave and bequeathed to the plaintiff, his wife, all the income of his property and effects, of what nature or kind soever, as he should leave in the colony of the Cape of Good Hope, the same to be enjoyed by her, whether covert or sole, for her sole and separate use, provided she should maintain and educate in a suitable manner his child, named Maria Ann Eliza, &c.; and upon the decease of his said wife, he gave and bequeathed all his property which he should leave in the said colony to his said child or children, if more than one, in equal shares; and the said testator appointed the said John Robert Thomson, Harrison Watson, and William Smith to be executors of the said codicil, and of the property thereby bequeathed. By a third codicil he directed certain property not to be sold until the arrival of James Falconer in the colony. The testator died at the Cape of Good Hope on the 21st June, 1847, and his will was proved in the Prerogative Court of Canterbury in February, 1850. The testator had a considerable amount of personal estate, amongst which was a promissory note, made by Falconer, as follows:

Scorey v. Harrison.

"London, 11th September, 1845. — 500*l.* — Seven years after date, I promise to pay James Scorey, Esq., or order, 500*l.*, with interest from the date thereof, at the rate of 4*l.* per cent, per annum, payable quarterly; the said sum to be paid before the said term of seven years, at my option. — Payable at J. M. Boyer's, 3, St. Michael's alley, Cornhill." The Master found that Falconer was, at the time of the death of the testator, resident at the Cape of Good Hope. It was admitted at the bar that the testator was domiciled in England. The question now to be decided was, whether this promissory note passed by the above-mentioned bequest.

J. Russell, and *Martelli*, for the plaintiff, contended that the note did not pass by the clause in question. A promissory note has no locality; *Brook v. Turner*, 7 Sim. 671; and at the time when it was payable Falconer was in this country, and the note was payable here, and the testator was domiciled here; there is, therefore, nothing to make it property at the Cape of Good Hope. Story's Confl. of Laws, 516.

G. M. Giffard, on the other side. The testator was at the Cape at the time of his death, and Falconer was domiciled there. The residence of the debtor affects the locality of the debt. No presentment in London was necessary, as the part relating to payment in London is not in the body of the note. *Williams v. Waring*, 10 B. & Cr. 2. Where would this be *bona notabilia*? It depends on the residence of the debtor. Wms. Ex. 234. The question has frequently occurred as to probate duty. *Taylor v. Bell*, 2 My. & C. 109.

Selwyn and *Druce*, for other parties.

J. Russell, in reply. The rules as to probate are irrelevant. This is a question of construction simply. A personal debt has no locality. It does not appear from the report that Falconer was, and the codicil shows that he was not, at the Cape at the time of the testator's death.

KINDERSLEY, V. C., after observing that he must take the facts as they appeared on the Master's report, said — The effect of it is this: when Mr. Scorey made his codicil, and he died the day after, not only Mr. Scorey himself was resident at the Cape of Good Hope — I do not say domiciled — but Falconer was also actually resident at the Cape; and the question is, what did the testator mean by this language — [His Honor read the clause of the will.] What did the testator mean by that? Did he mean to include this property, which consisted of a right to sue and recover on that promissory note, or did he not? Now, if I could find in the codicil, or any testamentary script admitted to probate, any thing to lead me to say that he had not regard to probate or *bona notabilia*, or the necessity of presenting the note at a particular place — if I could find any expression of what was his intention, whatever was the law as to *bona notabilia*, I should decide accordingly; but I have nothing to guide me except these few words.

Scorey v. Harrison.

I am driven, therefore, to consider what is the law with regard to the locality of such property. Strictly speaking, it has no locality; but the law has said, that for certain purposes it shall have a locality when the party dies. The first question is as to probate — in what court is probate to be taken out; and that depends upon the question whether he had or not property in such a diocese or province. If he had property only in a given diocese, probate must be taken out in that diocese; if in more than one diocese, then in the province; if more, then in both provinces. The law, therefore, says, that for the purpose of determining in what court to take out probate, there shall be observed certain rules with respect to the locality, or supposed locality, of the property; and where there is a simple contract debt upon a promissory note, the court has said, that for the purpose of probate that debt shall be considered as having locality in the place where the debtor inhabited, which I understand to be the same as that of his residence. There is no distinction between the terms for this purpose. Now, if Mr. Falconer, at the time of the testator's death, had been resident in England, in any place within the diocese of Winchester, for instance, then it would have been necessary to take out probate or administration in the diocese of Winchester; but if there had been property in more dioceses, then in the province of Canterbury. That would be the case supposing Falconer resident in this country; and if that was the case the property would not come within the words of the will. But the facts found by the Master, which I must take to be accurate, are, that Falconer's residence was at the Cape of Good Hope at the time of the testator's death. It is said that the testator in his codicil alludes to the fact that Falconer was not, at the time of making that codicil, which was only the day before the testator's death, actually in the colony — he was expected; but that is quite consistent with his being resident in the colony; he might have left it a few days before, and have gone out for a temporary purpose; therefore I must assume Falconer to have been resident in the colony. Now, what other indication can I have of the testator's meaning than that which I have already referred to — that which the law defines to be locality? He has given no other mode of determining his meaning than by resorting to what the law says as to simple contract debts, for the purposes of *bona notabilia*, that the residence of the debtor is to govern the locality. I have no other resource than to decide that this debt, which was due from a person resident at the Cape to the testator at the Cape, is to be treated as intended by him to be included in this property so distinguished by him, and must be treated as property included in this bequest.

 Smith v. Wyley.

SMITH v. WYLEY.¹

November 17, 1852.

Specific Performance — Stamping Document of Title.

Contract to sell a freehold ground-rent of 20*l.*, arising from a wharf, "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser:—

Held, that the agreement was part of the subject of the contract, and that the vendor was bound to perfect it by having it properly stamped.

THIS was a claim by the purchaser for specific performance of a contract for the sale of certain freehold property, described in the particulars of sale as "Lot 34, a freehold ground rent of 20*l.* per annum, arising from a wharf adjoining lot 33, subject to an agreement for a lease for a term, of which ninety-nine years were unexpired at Christmas day last;" the agreement there mentioned was to grant a building lease, and was not stamped. The purchaser required the vendor to have the agreement properly stamped.

Benyon Parker and *T. H. Hall*, for the plaintiff, asked for a decree for specific performance, with an inquiry as to the title under which this question might be raised.

Selwyn, for the defendant, agreed to submit to the immediate decision of the court, whether the defendant could be compelled to stamp this agreement upon the present application. He argued, that though this might have been made an objection to the title, it could not be a reason for filing a claim for specific performance. The defendant might not be able to pay for the stamping of this agreement. At any rate, he could not be compelled to go to the office and have it stamped.

[STUART, V. C. The Court has power to compel the defendant to perform his contract, and, if necessary for that purpose, to oblige him to go to the stamp-office, or any office.]

He said further, that the property would be, in fact, more valuable without the lease, and that the present proceeding was vexatious.

The reply was not called for.

STUART, V. C. I think that the conduct of the defendant in this case is altogether unreasonable and unwarranted. There can be no doubt about the terms of the agreement which is the subject of this contract. This is a contract for the sale of freehold property, subject to an agreement to grant a building lease, and the particulars of sale

Ex parte Eyre and Higgins; In re Belton.

describe that the benefit to be derived from the purchase was the ground rent reserved on that agreement, and the reversion after the lease had been granted, pursuant to that agreement. It is not disputed that the agreement itself was the subject of this contract, or that it was to be delivered over to the purchaser, or that its validity is a matter of the greatest consequence to the purchaser, and was a term of the contract; but it is said that the vendor is entitled to deliver over to the purchaser, and to compel him to accept, an unstamped agreement. I cannot put that construction on the terms of this contract. I think that, by the terms of this contract, the agreement being mentioned, and being of great importance to the purchaser, the vendor is bound to deliver it in such a state as should make it a valid agreement, and, for that purpose, is bound to do every thing necessary on his part to make the agreement valid. [His honor alluded to certain facts, which, it was argued, amounted to a waiver of the right, if any, to have the agreement stamped, but which he thought had not that effect, and continued:] Then it was said that the validity of the agreement was wholly immaterial, for that if it was invalid, or even at an end, the property would be more valuable without it; but it is enough to see that the subject of the contract was the property with this agreement. There must be a decree for specific performance, with costs; and if the parties cannot come to an understanding, I must declare that the defendant is bound to deliver to the plaintiff the agreement as a valid and binding agreement.

*Ex parte EYRE AND HIGGINS; In re CHARLES BELTON, a bankrupt.*¹

November 23, 1852.

Bankruptcy — Petition to stay Certificate — Costs.

Upon a petition to stay the bankrupt's certificate coming on to be heard, it appeared that the petitioners had not been able to serve the petition upon the bankrupt, he having gone out of the jurisdiction. The court dismissed the petition, with costs as against the assignees; but, upon the petitioners undertaking not to file another petition, without costs as against the bankrupt.

On the 29th October the commissioner allowed the bankrupt his certificate, with a suspension for three months.

Renshaw now appeared for the two petitioning creditors, in support of an appeal from the decision of the commissioner, and asked that the certificate might be disallowed together. It appeared that the petitioners, though they had used every diligence for the purpose, had

¹ 16 Jan. 1147.

Ex parte Eyre and Higgins; In re Belton.

been unable to serve the petition upon the bankrupt, who had gone out of the jurisdiction. The bankrupt's solicitor had, it appeared, at first promised to accept service for the bankrupt, but had afterwards declined to do so; and the petitioners had, without however obtaining an order of the court for the purpose, then served the petition at the house occupied by the bankrupt up to the time of his going abroad.

KNIGHT BRUCE, L. J. It seems hard that the bankrupt should be enabled to secure his certificate by going abroad. Have these certificate petitions ever been allowed to stand over?

Bacon, Q. C., amicus Curia. I think the bankrupt has a right to have the petition heard, or, if not personally served, dismissed.

KNIGHT BRUCE, L. J. That is my impression. It certainly used to be so. My impression is, that this petition must be dismissed.

Glasse, for the bankrupt, asked for costs; citing *Ex parte Long*, 1 Gl. & J. 351.

KNIGHT BRUCE, L. J. We are not bound to give the bankrupt his costs, and shall not do so if the petitioners will undertake not to file another petition. On the other hand, if the petitioners will not give that undertaking, the bankrupt may as well have his costs at once.

Renshaw, for the petitioning creditors, gave the required undertaking.

Bird, for the assignees, who had been served with the petition, asked for costs.

An order was then made dismissing the petition, with costs as against the assignees, and without costs as against the bankrupt, the petitioners undertaking not to file another petition.¹

¹ See 1 Rose, 67, note; *Ex parte The Bank of Scotland*, 1 V. & B. 5; 1 Rose, 375; *Ex parte Gardner*, Id. 45; Id. 377; *Ex parte Kendall*, 1 V. & B. 543; 2 Rose, 115; *Ex parte Coulbourn*, Id. 187; *Ex parte Harford*, 1 Buck, 38; *Ex parte Groome*, Id. 39; *Ex parte Hetherington*, 1 Mont. & A. 607; 4 Deac. & C. 218; *Ex parte Moore*, 1 Gl. & J. 253; *Ex parte Hopley*, Id. 63; 2 J. & W. 220; *Ex parte Levy*, 4 Deac. & C. 224; *Ex parte Furnival*, 1 Gl. & J. 254; and *Ex parte Birch*, 2 Gl. & J. 206.

In re The Northampton Charities. — Booth v. Tomlinson.

In re THE NORTHAMPTON CHARITIES.¹

January 12, 1853.

Jurisdiction — Vice-Chancellor — Municipal Charities.

Semble, the Vice-Chancellors have jurisdiction to hear petitions and make orders for the appointment of new trustees of municipal charities.

THIS was a petition under Sir Samuel Romilly's Act, and the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, for the appointment of new trustees of municipal charities in the place of some that had died, and of others who were desirous of retiring from the trusts.

After the Lord Chancellor (Lord Cranworth) had disposed of the case, it was mooted by

The Solicitor-General, (Mr. Bethell,) whether the Vice-Chancellors had not jurisdiction to entertain these petitions, which now had become very numerous.

Baggallay, who appeared in support of the petition, said that he came prepared to argue that the Vice-Chancellors had, under the Trustee Act, 13 & 14 Vict. c. 60, complete jurisdiction to make the order appointing new trustees. He referred to the 32d section of that act, and to the 71st section of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76; and contended that the 32d section was in the most general terms, and would include such cases as the present; but that some doubt had been entertained upon the question in the other branches of the court.

THE LORD CHANCELLOR, after considering the sections, said that he was clearly of opinion that there was nothing to prevent the Vice-Chancellors taking jurisdiction in this and the like cases, and that it would be much more convenient that they should do so.

BOOTH v. TOMLINSON.²

November 24, 1852.

Examination of Defendant vivâ voce before the Master.

A DECREE was made in this cause before the recent acts (15 & 16 Vict. cc. 80, 86) came into operation, directing a reference to the

¹ 17 Jur. 6.

² 17 Jur. 29.

Sergison v. Livingstone.

Master, who was to be at liberty to examine the defendant on interrogatories.

Lloyd and *H. Clarke* now moved that the examination might be *vivâ voce*, under the above acts. They referred to the 39th and 40th sections of the 15 & 16 Vict. c. 86, and to the 7th, 29th, 30th, 36th, and 39th sections of the 15 & 16 Vict. c. 80.

Follett and *Kinglake* opposed the motion.

ROMILLY, M. R., after consulting the other judges, said he was of opinion that the statutes in question did not authorize him to grant the present application. Causes in the Master's office before the acts came into operation must be proceeded with according to the old practice.

SERGISON v. LIVINGSTONE.¹

January 11, 1853.

Practice — Chambers.

THIS was an unopposed motion by the defendant for the production of documents under the 15 & 16 Vict. c. 86, s. 70, and the doubt was whether it should not be made in chambers, according to the mode prescribed by the 15 & 16 Vict. c. 80, s. 26.

C. P. Cooper, for the motion.

KINDERSLEY, V. C. The practice is, in the first place, to make a formal affidavit, and make an application to the judge in chambers, before which it cannot be ascertained whether the application ought to be made in chambers or in open court.

C. P. Cooper. I have also to move, in the case of *Burrand v. Archer*, to enlarge the publication.

KINDERSLEY, V. C. Let the parties proceed in both cases by way of summons in chambers, in the first instance.

¹ 17 Jur. 33.

Woodcock v. The Oxford, &c., Railway Company. — *In re* Martin's Estate.

WOODCOCK v. THE OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY.¹

January 17, 1853.

Motion — Costs.

The costs of an abandoned motion must be applied for, on the next seal after that for which notice of motion was given,

In this case the plaintiff had obtained the common injunction, and in May last the defendant served the plaintiff with notice of motion to dissolve it. He shortly afterwards obtained an order *nisi* to dissolve it. The motion had stood over once for the convenience of the plaintiff's counsel, and had not been brought on at any time by the defendants' counsel.

Malins, for the defendants, now called on *Follett*, for the plaintiff, to show cause.

Follett first asked for the costs of the motion to dissolve, as of an abandoned motion.

Malins admitted that this notice had been served in error, and that the motion was abandoned, but objected to pay the costs, as the plaintiff had not asked for them at the proper time.

KINDERSLEY, V. C., refused to order payment of these costs. Strictly speaking, if the motion is not saved, you must ask at the next seal for the costs; if it is allowed to remain longer, you cannot have them. If you ask for the costs at that seal, the motion is either made, or, if proper, it is saved, or else it is dismissed with costs as abandoned. In May last you undertook to show cause on the merits, and then would have been the time to apply for the costs of the special motion.

In re MARTIN'S ESTATE.²

November 26, 1852.

Re-investment of Purchase-Money.

On petition for re-investment of purchase-money paid into court, and arising from settled lands bought under legislative powers, the court, in the first instance, only approves of the

¹ 17 Jur. 33.

² 17 Jur. 30; 22 Law J. Rep. (N. S.) Chanc. 248.

Smith v. The Swansea Dock Company.

propriety of the proposed investment, and reserves the directions as to the completion of the purchase until the certificate of a conveyancing counsel is obtained, approving of the title.

THIS was a petition for re-investment, in the purchase of land, of a sum of money which had been paid into court in respect of certain settled lands taken by the trustees of Greenwich Hospital under their legislative powers. The petition was presented by the tenant for life of the property in respect of which the money was paid into court, stating that an eligible investment had been found for the money, and that a contract of purchase had been entered into, subject to the approbation of the court, and praying a confirmation of the contract, and that proper inquiries might be made as to the title of the property proposed to be purchased; and that, upon the certificate of one of the conveyancing counsel being obtained, approving of the title, the purchase-money might be paid to the vendor, and the estate conveyed upon the trusts of the settlement of the lands taken by the hospital.

Hobhouse, for the petition.

Pryor, for the trustees of the hospital.

ROMILLY, M. R., said that the only order he could then make was to approve of the contract so far as regarded the value and propriety of the investment. The rest of the petition must stand over until the petitioner could obtain the certificate of one of the conveyancing counsel as to the title.

SMITH v. THE SWANSEA DOCK COMPANY.¹

December 16, 1852.

Practice — Affidavits — Witnesses.

AFTER the motion had been opened, the plaintiff filed an affidavit in reply to the defendants' answer.

Follett and James, for the defendants, objected.

Russell, J., amicus Curie, mentioned a case before Lord Truro, C., in which this had been refused.

KINDERSLEY, V. C., refused to admit it. This could only be done after the motion had been opened, when the court itself required

¹ 16 Jur. 1130.

Hoole v. Roberts.

information as to particular facts. The practice ought to be strictly observed in such cases, otherwise the proceedings on a motion might be interminable.

Bacon and *Bevir*, for the plaintiff, then proposed to call the plaintiff, who was in court, and to examine him *vivâ voce*, under sect. 40 of stat. 15 & 16 Vict. c. 86, by which the court has a discretion so to do.

KINDERSLEY, V. C., however, refused. The clause, though it applied to proceedings on motion, required that the witness should be summoned before the examiner by subpoena in the ordinary way, for which application must be made before the motion was brought on. If the plaintiff chose to begin without being ready with his evidence, the court will not stop the proceedings in order to enable him to complete it. The same reason which applied to the non-admission of the affidavit, would also apply here.

HOOLE v. ROBERTS.¹

November 13, 1852.

Practice — Amendment of Order made on Petition after it was drawn up.

Wiglesworth applied to have an order, made upon petition in this suit, and drawn up, amended. The petition was for payment of a fund in court to the petitioner. Since the order had been drawn up, it was first discovered that one of the petitioners was a *feme covert* at the time of presenting the petition. Leave was then given to amend the petition, by stating this fact, and praying payment of this petitioner's share to her husband. It was now sought to have the order similarly amended, in conformity with the amended prayer.

STUART, V. C., after consulting with the registrar, said that the order might be amended as required.

¹ 18 Jur. 1135.

Ostell v. Lepage.

OSTELL v. LEPAGE.¹

November 10 and 11, 1852.

Practice — Staying Proceedings on Final Decree in Similar Suit in India.

Where there has been a final decree in a suit in India, upon motion by the defendant in a similar suit in England, between the same parties and for the same purpose, the court in England will make an order staying all proceedings in the English suit, without prejudice to any proceedings which the plaintiff may be advised to adopt with reference to the decree and proceedings in India.

An administrator *de bonis non*, &c., in India, appointed, by the authority of the plaintiff, administrator in England, is substantially the same party for this purpose.

Such administrator in India is authorized to assent to a compromise, under the authority of the court in India, and a decree adopting that compromise is a final decree.

After such decree the plaintiff in England cannot, by supplemental bill or amendment under the new practice, continue the English suit, in order to obtain discovery of facts which would enable him to set aside the decree in India.

In this case (reported 16 Jur. 404; s. o. 10 Eng. Rep. 250) J. Parker, V. C., overruled the plea of the pendency of a suit in India. The defendant, Lepage, put in his answer in the present suit; to this answer the plaintiff excepted, and the exceptions were set down to be argued. The proceedings in India had been continued meanwhile, and on the 2d July last, a final decree was pronounced in that suit. The first intimation of this fact was received in England on the 16th August last, by a letter from India, dated the 3d July. A copy of the decree was afterwards received.

The decree, after reciting a previous decree referring it to the Master to take an account of the partnership dealings between Thomas Ostell and the defendant, from the commencement of the partnership until the 30th December, 1841, and between Margaret Ostell and the defendant to the 21st October, 1848; and directing that Lepage should be at liberty to lay before the said Master any proposal for a compromise on payment of a fixed sum, instead of taking such accounts, and if he did, that the Master should inquire and state whether it would be for the benefit of Olivia Mary Margaret Ostell, the infant, that such proposal should be accepted; and reciting the Master's report, whereby, amongst other things, he found that certain terms of compromise proposed were for the benefit of the infant, Olivia Mary Margaret Ostell, was as follows:—"This court doth decree and declare, that the proposal for compromise mentioned in the said report of the said Master is for the benefit of Olivia Mary Margaret Ostell, the infant daughter of the said Thomas Ostell, deceased, in the said report named, and ought to be accepted, and doth therefore order and decree the same accordingly; and this court

¹ 16 Jur. 1134.

Ostell v. Lepage.

doth order that the said defendant, Richard Chaffin Lepage, be at liberty, according to the terms of the said compromise, to purchase all the interest of the said infant and of the said complainant, as such administrator and such attorney of the said Margaret Ostell as in the pleadings mentioned, in the matters in dispute, for the sum of 63,842 company's rupees, 8 annas, 11 pice; and that he do pay to the complainant, Robert Molloy, as such administrator and attorney as aforesaid, the sum of 12,768 company's rupees, 8 annas, 3 pice, in part payment of the said principal sum of 63,842 company's rupees, 8 annas, 11 pice, and do pay the balance or residue of the said sum by instalments, bearing interest at the rate of 5l. per cent. per annum — that is to say, on the 1st January, 1853, the like sum of 12,768 company's rupees, 8 annas, 3 pice, and interest; on the 1st July, 1853, the like sum of 12,768 company's rupees, 8 annas, 3 pice, and interest; on the 1st January, 1854, the like sum of 12,768 company's rupees, 8 annas, 3 pice, and interest; and on the 1st July, 1854, the like sum of 12,768 company's rupees, 8 annas, 3 pice, being the residue of the said principal sum of 63,842 company's rupees, 8 annas, 11 pice, together with interest. And it is further ordered, that the said instalments be secured by a bond of the said defendant, Richard Chaffin Lepage, together with an assignment, by way of mortgage, of all and singular the stock in trade, property, and effects, now on the premises of the said defendant, situate in Tank Square, in Calcutta, and all such other property and effects as shall from time to time be added to the said stock and effects, with liberty to the said defendant to redeem the said mortgage at any time before the expiration of the period limited for payment of the said debt. And it is further ordered, that all necessary and proper deeds, conveyances, and assurances for effecting the said compromise be executed, and that all necessary parties do join therein; and the said Master is to settle the said bond, assignment, deeds, conveyances, and assurances; and the first mentioned sum of 12,768 company's rupees, 8 annas, 3 pice, shall be paid by the said defendant as aforesaid upon the tender to him of an assignment and release, duly executed, by the said complainant as such attorney and administrator as aforesaid, in respect of the interest so to be purchased by the defendant as aforesaid in the partnership property in the pleadings mentioned. And it is further ordered, that the said defendant, Richard Chaffin Lepage, do pay to the solicitor of the said complainant, Robert Molloy, his costs of this suit, when the same shall have been taxed by the taxing master of this court; and all parties are to be at liberty to apply to this court from time to time, as they may be advised." The present motion was, that all further proceedings in the cause in England might be stayed.

W. M. James and Cotton, for the motion, argued that, the decree in India being a final decree, the present suit should be stayed. *Garcus v. Ricardo*, 14 Sim. 265; *Harrison v. Gurney*, 2 J. & W. 563; *Ostell v. Lepage*, 16 Jur. 404; s. c. 10 Eng. Rep. 250.

Ostell v. Lepage.

Russell and Bagshawe, contra, urged that the suits were not for exactly the same purpose, more extensive relief being prayed in the suit in England; that the two suits were not between the same parties, the plaintiffs being different persons; and that the Indian suit did not proceed to a regular decree, but was compromised without authority on the part of the plaintiff there, and that the compromise was upon terms very disadvantageous to the estate which the plaintiff represented. This could be proved in the present suit by amending the bill, and requiring a full answer. The supplemental matter might now* be stated by amendment, under the 15 & 16 Vict. c. 86, s. 53. Then this motion was without precedent, and was founded only upon an extra judicial observation of J. Parker, V. C., in *Ostell v. Lepage*, *ubi sup.* The proper course would be for the defendant to file a cross bill, in the nature of a plea *depuis darrein continuance* at common law. Lord Redesd. Treat. Plead. 99, 5th ed.

STUART, V. C., without hearing the reply. This is an application to stay proceedings in a suit in this court instituted by a legal personal representative, in order to recover, for the estate which he represents, what may be found due in respect of certain partnership transactions. The person whom the plaintiff represents was a person engaged in the bookselling business in Calcutta. It appears upon the proceedings that a litigation, for the same purpose substantially as this suit, has been instituted in the court in Calcutta, and it is now brought to the attention of this court by the present motion; that that litigation in Calcutta, instituted not by the present plaintiff, but by a person who, in India, became, under the authority of the plaintiff, the representative of the same estate which is here represented by the plaintiff, has ended in a final decree, which has established that a certain sum is due to the estate in respect of the partnership transactions which are the subject of both suits. I am, therefore, asked, on the part of the defendant, that — there being this decree of a court of competent jurisdiction — the present proceedings in this court may be stayed. Against this it is urged that the relief prayed in this suit is more extensive than in the suit in India; but I cannot discover that there is a perfectly just ground for that contention. It is next urged that the decree in the court in Calcutta is not between the same parties who are suing in this court, for the plaintiff, who represents the estate in Calcutta, is not the same individual who sues here, but he became the representative under the authority of the person who is suing in this court; and I cannot therefore pay attention to that part of the argument which asks me, on the ground that the two suits are not between the same parties, to refuse this motion.

Next, it is contended that the suit in India was settled under a compromise by that court. That can be no objection to the finality of the decree, if a party, competent to conduct the proceeding, did arrive at that end by a compromise authorized by the court. If that was done by a party having sufficient authority, the decree is, and ought to be, binding; and even if done without such authority, proceedings must be taken of a nature very different to the pleadings in

Ostell v. Lepage.

this suit, in order to get rid of that decree; and therefore, on that ground, I see no reason for refusing this motion. Then, it is said, that what appears on the face of the decree, and what the court has now before it as to the proceedings in India, show that this court ought not to recognize the proceedings in the court in Calcutta. The decree, however, seems to be a regular decree, directing accounts to be taken in the first instance, and then a final decree directing a compromise, and sanctioning the amount to be paid. The decree, therefore, is one that this court must recognize. But the question which I have to consider is, whether, this decree being for the same object, and concerning the same estate, any good purpose could be answered by allowing the present litigation, which assumes that there has been no final decree in India, to proceed in its present shape. Upon that part of the case, it is conceded, on the part of the plaintiff, who wishes to go on, that some alteration should be made in the frame of the proceedings in the present cause, because it is suggested that, by amendment, the matter should be put into a shape in which the court could decide on the finality of the decree in India. I cannot entertain that view of the case. It is plain that a bill to set aside the decree in India, or to get more extensive relief in respect of the matters in this case than is given by that decree, must be framed on a different plan from the bill in the present suit, which has proceeded so far as to obtain an insufficient answer. But then it is said, that in order to put the proceedings into a proper form by amendment, or by filing another bill to set aside the decree, some discovery ought to be allowed from the present defendant in this suit, and that the court should see, before it stays proceedings, that a sufficient answer is put in to give this discovery. It is plain, however, upon all sound rules for conducting the proceedings in this court, that the discovery sought to be obtained by means of the answer ought to be ancillary to the relief prayed by the bill; and the relief now prayed is wholly inconsistent with any case, if any case can be made, for setting aside the decree in India. It would be, therefore, entirely useless to allow this suit to proceed for the purpose of enabling the plaintiff to obtain this discovery by the bill as at present framed. I therefore make an order staying all proceedings in this court, without prejudice to any proceedings that the plaintiff may be advised to adopt with reference to the decree and proceedings in India.

J. Russell and *Bazalgette* asked for the addition of the words "or otherwise" to the order.

STUART, V. C., refused to add these words.

In re THE TRUSTEE RELIEF ACT, 10 & 11 Vict. c. 96, and *in re* WALKER'S TRUSTS.¹

November 13, 1852.

Practice — Amendment of Petition — Declaration of Right.

A petition, praying the payment out of court, under the above act, of a small sum to the petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, and payment accordingly; and, subject to such amendment, an order was made containing such a declaration, and for payment in conformity therewith. Costs of all parties out of the fund.

THIS was a petition under the Trustee Relief Act, for a declaration that certain persons named were entitled to a fund of 188*l.* 10*s.* 1*d.* Consols, standing in the name of the Accountant-General in trust in the above matter, in equal shares, and that the cost of the application should be taxed and paid out of the fund.

Roxburgh, for the petition.

Follett and *Steere*, for other parties.

STUART, V. C., was of opinion, that, on the construction of the instrument creating the trust, the petitioners were not entitled to the shares in the fund which they claimed, and that, therefore, he could make no order on the petition in its present frame. He wished very much, considering the smallness of the fund, and the difficulty of the question of construction, that he could at once make a declaration of the rights of the parties.

Roxburgh suggested that the money was in court under the Trustee Relief Act, which gave a large jurisdiction.

J. Russell, amicus Curiae, referred to *Lynn v. Beaver*, Turn. & R. 70, in which Lord Eldon made a declaration of the rights of parties, though he dismissed the bill.

STUART, V. C., alluded to the 15 & 16 Vict. c. 86, s. 50, by which it is provided that it shall be lawful for the court to make declarations of right without granting consequential relief; and said that in this case he would make a declaration upon an amendment of the petition on the authority of *Lynn v. Beaver*.

An order was made, declaring who were the parties entitled to the fund, and in what shares, and for payment accordingly, on the petition being amended by the addition of a prayer to that effect. Costs of all parties out of the fund.

¹ 16 Jur. 1154.

Ostell v. Lepage.

this suit, in order to get rid of that decree; and therefore, on that ground, I see no reason for refusing this motion. Then, it is said, that what appears on the face of the decree, and what the court has now before it as to the proceedings in India, show that this court ought not to recognize the proceedings in the court in Calcutta. The decree, however, seems to be a regular decree, directing accounts to be taken in the first instance, and then a final decree directing a compromise, and sanctioning the amount to be paid. The decree, therefore, is one that this court must recognize. But the question which I have to consider is, whether, this decree being for the same object, and concerning the same estate, any good purpose could be answered by allowing the present litigation, which assumes that there has been no final decree in India, to proceed in its present shape. Upon that part of the case, it is conceded, on the part of the plaintiff, who wishes to go on, that some alteration should be made in the frame of the proceedings in the present cause, because it is suggested that, by amendment, the matter should be put into a shape in which the court could decide on the finality of the decree in India. I cannot entertain that view of the case. It is plain that a bill to set aside the decree in India, or to get more extensive relief in respect of the matters in this case than is given by that decree, must be framed on a different plan from the bill in the present suit, which has proceeded so far as to obtain an insufficient answer. But then it is said, that in order to put the proceedings into a proper form by amendment, or by filing another bill to set aside the decree, some discovery ought to be allowed from the present defendant in this suit, and that the court should see, before it stays proceedings, that a sufficient answer is put in to give this discovery. It is plain, however, upon all sound rules for conducting the proceedings in this court, that the discovery sought to be obtained by means of the answer ought to be ancillary to the relief prayed by the bill; and the relief now prayed is wholly inconsistent with any case, if any case can be made, for setting aside the decree in India. It would be, therefore, entirely useless to allow this suit to proceed for the purpose of enabling the plaintiff to obtain this discovery by the bill as at present framed. I therefore make an order staying all proceedings in this court, without prejudice to any proceedings that the plaintiff may be advised to adopt with reference to the decree and proceedings in India.

J. Russell and *Bazalgette* asked for the addition of the words "or otherwise" to the order.

STUART, V. C., refused to add these words.

In re Walker's Trusts.

In re THE TRUSTEE RELIEF ACT, 10 & 11 Vict. c. 96, and *in re* WALKER'S TRUSTS.¹

November 13, 1852.

Practice — Amendment of Petition — Declaration of Right.

A petition, praying the payment out of court, under the above act, of a small sum to the petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, and payment accordingly; and, subject to such amendment, an order was made containing such a declaration, and for payment in conformity therewith. Costs of all parties out of the fund.

THIS was a petition under the Trustee Relief Act, for a declaration that certain persons named were entitled to a fund of 188*l.* 10*s.* 1*d.* Consols, standing in the name of the Accountant-General in trust in the above matter, in equal shares, and that the cost of the application should be taxed and paid out of the fund.

Roxburgh, for the petition.

Follett and Steere, for other parties.

STUART, V. C., was of opinion, that, on the construction of the instrument creating the trust, the petitioners were not entitled to the shares in the fund which they claimed, and that, therefore, he could make no order on the petition in its present frame. He wished very much, considering the smallness of the fund, and the difficulty of the question of construction, that he could at once make a declaration of the rights of the parties.

Roxburgh suggested that the money was in court under the Trustee Relief Act, which gave a large jurisdiction.

J. Russell, amicus Curiae, referred to *Lynn v. Beaver*, Turn. & R. 70, in which Lord Eldon made a declaration of the rights of parties, though he dismissed the bill.

STUART, V. C., alluded to the 15 & 16 Vict. c. 86, s. 50, by which it is provided that it shall be lawful for the court to make declarations of right without granting consequential relief; and said that in this case he would make a declaration upon an amendment of the petition on the authority of *Lynn v. Beaver*.

An order was made, declaring who were the parties entitled to the fund, and in what shares, and for payment accordingly, on the petition being amended by the addition of a prayer to that effect. Costs of all parties out of the fund.

¹ 16 Jur. 1154.

Boulding v. Boulding.

BOULDING v. BOWLING.¹

November 17, 1852.

Claim — Orders of the 22d April, 1850 — Averment of Representation.

In claim for administration by residuary legatee, against executor of executrix not having proved, it is not sufficient to aver merely that the defendant is executor of his testatrix, and that his testatrix was executrix of the testator in the cause.

THIS was a claim for administration of the personal estate of George Boulding, deceased. The claim stated that George Boulding, by his will, dated the 27th July, 1847, bequeathed all his property, on the death or second marriage of his wife, Rose Boulding, for the benefit of his children; "that the said Rose Boulding was the executrix of the said George Boulding; and that Robert Boulding was the executor of the said Rose Boulding." The plaintiff was one of the children of the testator. Rose Boulding survived the testator, proved his will, and, as the plaintiff alleged, possessed assets, and died unmarried on the 2d March, 1851, having made her will, and thereby appointed the sole defendant one of her executors. Her will was not proved, but the defendant entered into possession of her property, part of which, as the plaintiff alleged, was assets of the original testator. The defendant admitted the possession of some furniture which had belonged to the original testator, but which Rose Boulding considered to be her own property, having out of her own moneys paid debts of the testator to an amount beyond the value of this property. He denied possession of other assets.

Ellis, for the plaintiff.

[STUART, V. C., observed that there was no averment, that the defendant was legal personal representative of the testator, and it seemed, therefore, to his Honor, that the claim must be dismissed, with costs.]

He pointed out that the claim was, in this respect, in the form given in No. 3, Schedule (A.) Orders of the 22d April, 1850, and said that the defendant here was not legal personal representative of either the original testator or of his widow, but only an executor, who had possessed assets without proving the will of either of them. It was not competent to him to set up as his defence to the suit that he had not proved the will. See 1 Wms. Exors. 246. He asked, at any rate, for liberty to amend, and that the claim might stand over until the authorities at the stamp-office had compelled the defendant to prove the will of Rose Boulding, as they had said they would do.

¹ 16 Jur. 1154.

Smith v. Boucher.

Daniel, for the defendant, asked that the claim might be dismissed, with costs.

STUART, V. C., said that he thought he could not refuse the request.

Claim dismissed, with costs.

SMITH v. BOUCHER.¹

November 23, 1852.

Trustee Act, 1850, s: 30 — Declaration that equitable Mortgagor, ordered to convey, is a Trustee.

The court is not authorized, by the above section, to add to the order of course to make a foreclosure decree absolute, a declaration that the mortgagor, being out of the jurisdiction, is a trustee for the mortgagee, although the former order *nisi* was, that he should convey to the mortgagee, the mortgage being equitable.

THIS was a claim for foreclosure of an equitable mortgage. The usual order had been made that the mortgagor should redeem, or in default be foreclosed, and convey to the mortgagee. The master had certified that default had been made. The mortgagor was out of the jurisdiction, and refused to convey.

Shapter moved *ex parte* to make the foreclosure absolute, and to add to the order for that purpose a declaration, that the mortgagor, who had been ordered to convey, was a trustee under the 30th section of the Trustee Act, 1850, in order that a petition might be presented to obtain a vesting order under the 9th section. He said that the registrar would not otherwise draw up the order absolute, and cited *Bowra v. Whight*, 15 Jur. 981; s. c. 3 Eng. Rep. 190.

[STUART, V. C. You ask, on a motion of course, to tack to the order to be made, a special direction, depending on the construction of the Trustee Act. This may be done on a decree; but does a decree mean an order of course?]

He referred to *Rowley v. Adams*, 15 Jur. 1002; s. c. 6 Eng. Rep. 124, where it was intimated that a similar declaration might be made on petition.

STUART, V. C. A petition is very different from a motion of course. The act authorizes me to do this on a decree: it does not follow that I can do it on an order made upon a motion of course.

Motion refused.

¹ 16 Jur. 1154.

Harvey v. Brooks.

HARVEY v. BROOKE.¹

November 25, and December 9, 16, and 17, 1852.

Practice — Master in Chancery Abolition Act, s. 40 — Reference to Conveyancing Counsel — Infant.

No special or substantive order will be made in ordinary cases for a reference to conveyancing counsel under the 40th section of the 15 & 16 Vict. c. 80, but the court will adjourn the case, in order that the opinion of counsel may be taken in the mean time. Form of order under such a reference.

In an infant's case, where money is to be paid into court, two orders are necessary — one for the payment of the money, and a second for the execution of the conveyance, reciting the first order.

THIS was an infant's suit. A lease had to be granted by an infant.

G. Simpson stated that this case had been heard before the long vacation, and that the minutes of a decree had been drawn up then, but no order for reference as to the lease had been then made. On the 4th November, however, an order had been made, under which it had been referred to Mr. Jarman to settle the lease.

[TURNER, V. C. No, no: no order was made for a reference. The court merely adjourns the cause to chambers in order to get the opinion of counsel in the mean time. Then, when the opinion is obtained, or the lease is settled, it comes back here again. No order is drawn up or made for a reference merely.]

He said that a draft lease, which he now produced, had been settled and approved by Mr. Jarman.

TURNER, V. C. The court must be satisfied that the lease to be executed corresponds with that draft. The best way will be for you to produce to the registrar in court an engrossment, ready for execution, together with an affidavit that it is a true copy of that draft so approved and settled. The deed must be brought into court to be marked by the registrar, with a note to that effect. Then the court will direct that the infant execute that deed. The order now to be made had better be somewhat in this form: — "This cause having come on to be heard on a certain day, and having been then ordered to stand over, in order that a lease might be prepared and approved of by one of the conveyancing counsel of this court, and it now appearing that a lease has been prepared and settled by such counsel, and the lease being now produced, order it to be executed by all proper parties." The order will date as of this day.

Phillips, for other parties.

¹ 17 Jur. 1; 22 Law J. Rep. (N. S.) Chanc. 14.

Harvey v. Brooke.

December 9. *G. Simpson*, again mentioned this case. It appeared that the draft, as settled, recited the payment of the *premium* for the lease into court, and also the order which it was now wished to obtain, namely that the infant should execute the conveyance; and from what had previously fallen from the court, it seemed necessary that the order to be made for the execution of the engrossment by the infant should refer to the conveyance as already prepared — each document, therefore, anticipating the other.

December 16. TURNER, V. C. Will you be so kind as to state the circumstances in writing, and then I will communicate with the other judges on the subject. The consideration money must, I think, be paid into court. That would be necessary before any order for execution of the lease could be made.

The following statement was afterwards handed up to the court:—
“ This is a claim for specific performance of a covenant for renewal of a lease, and was rendered necessary by the inability of one of the parties, through his infancy, to grant the new lease. The question is, what is the proper course in framing the order which has been made, and directing the infant to execute the deed which has been now settled by Mr. Jarman, one of the six conveyancing counsel. The cause has been often before the court, and Sir G. Turner, V. C., has expressed his opinion that the plaintiffs should have a renewal, and that 84*l.*, the fine, should be paid into court in the suit. On the 2nd or 3d November, 1852, the Vice-Chancellor directed one of the six conveyancing counsel to settle a proper lease, and the parties agreed upon Mr. Jarman, but no order of reference was drawn up, nor has any order whatever yet been drawn up. Mr. Jarman has settled the lease, and has said in it, ‘recite the declaration of the rights of the plaintiffs, and the order for paying in the 84*l.* ;’ but as the Registrar had not passed any such order, it is not set out in extenso in the draft lease. The lease, too, is expressed to be in consideration of the sum of 84*l.*, which is stated to have been paid into court. The Vice-Chancellor, on the 25th November, directed the deed to be engrossed. The plaintiffs propose that the order shall be passed as of the 25th November, declaring the rights of the plaintiffs, and ordering the 84*l.* to be paid in, and that this order shall be recited fully in the lease, and that the draft, with this full recital, shall be engrossed in duplicate, and brought into court on the day to which the cause stands over, with an affidavit of the correctness of the engrossment, (but showing that Mr. Jarman’s note, that the order is to be recited, has been complied with,) and the Accountant-General’s certificate showing that the 84*l.* has been paid in; and then the court will direct the Registrar to sign a memorandum that this is the deed produced, and order that the infant and other parties shall execute that deed which the Registrar has so marked. In this particular case, an order as of a past date seems indispensable, unless the court will order the infant to execute the deed without seeing the money paid in first, or unless the infant’s execution be ordered on a condition of paying in, which would be inconvenient. Unless an order be made and recited in the deed itself,

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the reference to the suit would be very incomplete, stopping short of the order; and the only thing to show on the face of the deed that the infant had had authority would be the Registrar's note that this deed had been produced in court on a certain day, or to some such effect."

December 17. TURNER, V. C., now said that he had consulted the other judges, and that in this particular case, as money was ordered to be paid in, two orders would be necessary, namely one at the hearing of cause, ordering the money to be paid in, and the other ordering the execution of the lease by the infant.

KERR v. THE MIDDLESEX HOSPITAL.¹

December 18 and 20, 1852.

Will — Annuity — Perpetual or for Life.

A testator, having some real property, and considerable sums invested in foreign funds, after having by his will given various pecuniary legacies, said, "I desire that my executors shall purchase annuities for each of my two sisters, E. B. and H. F., of 100*l.* a year each, the said annuities to be purchased in the British funds." He then gave other annuities, and proceeded — "I direct my landed property at O. to be sold by auction, and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property. After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per cent. consols, for the benefit of a cancer ward in the Middlesex Hospital": —

Held, (dissentiente Lord CRANWORTH, L. J.), reversing the decision of the Master of the Rolls, that the annuities given to E. B. and H. F. were not for life only, but perpetual.

Quere, what is the meaning of "British funds," as occurring in this will?

Per the Lord Chancellor. Where, in these cases, the will is fairly open to the construction that the absolute interest passes, the authority of parliament in favor of general devises of land ought to have some influence.

THIS was an appeal from a decision of Sir J. Romilly, M. R., upon the construction of the will of Sir Joseph De Courcy Laffan, Bart., dated the 15th of August, 1846, which was as follows:—"I leave all my property, of whatever kind it may be, in England or elsewhere, of which I shall die possessed, to Thomas Knox, Earl of Ranfurly, in Ireland, and Charles Kerr, Esq., of the house of Fletcher, Alexander, & Co., of King's Armsyard, London, and Henry Houndle, Esq., of the Adjutant-General's office, to have and to hold the same in trust for the following purposes: — I leave to my well beloved daughter-in-law, Frances Lagier, the sum of 3,000*l.*, to hold the same independent of her husband, and to be disposed of, by her will, properly

¹ 17 Jur. 49; 22 Law J. Rep. (N. S.) Chanc. 355.

signed and executed. I leave to her sister, Jane Symes, and the Rev. Mr. Lagier, husband of the aforesaid Frances Lagier, the sum of 1,000*l.* each. I desire that my executors shall purchase annuities for each of my two sisters, namely, Mrs. Eliza Burns, of Thurles, Ireland, and Mrs. Helen Fitzpatrick, of Killenall, Ireland, of 100*l.* a year each, the said annuities to be purchased in the British funds. I leave 50*l.* a year to my niece, Mrs. Catherine Quinlan, now living at Lough, near Thurles, Ireland, to hold the same independent of her husband. I leave 25*l.* to each of my nieces, Ellen and Susan Laffan, and also 25*l.* a year to Joseph Laffan, children of my late brother, John Laffan." He then gave several legacies, and proceeded:—"I direct my landed property at Otham to be sold by auction, and the produce to go to the carrying out of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property." He then directed all his personal property (enumerating various foreign funds in which he had property) to be sold, and thus continued:—"After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per cent. consols, for the benefit of a cancer ward in the Middlesex Hospital of London." And he appointed the said Earl of Ranfurly, Charles Kerr, and Henry Houndle, executors of his will. The testator, by a codicil to his will, bequeathed all his interest and property in the East Indian funds, to his nephew, Captain R. Laffan, and proceeded:—"I also leave to the same Captain R. Laffan all my estate and landed property in Otham, Kent. I leave and bequeathe 50*l.* a year to Mrs. Catherine Quinlan, my niece. I leave and bequeathe to Joseph Laffan, my nephew, 50*l.* a year, over and above what I left him in my will." The testator died on the 7th July, 1848. In this suit, which was instituted by the executors, Kerr and Houndle, for the administration of the estate, a question arose as to whether the annuities given by the will were terminable upon the respective deaths of the annuitants, or whether the annuities were perpetual. The Master of the Rolls decided that the respective annuities were for life only.¹ Eliza Burns, one of the annuitants, now appealed from that decision.

¹ The following is taken from the short-hand writer's note of the Master of the Rolls' judgment upon that occasion:—"This is a case in which the testator has given all his property, or the greater part of it, away from his relations, for the sake of a charity. I should have been very glad if I could have come to an opposite conclusion from that which appears to me to be the plain and manifest meaning of the will; but I am of opinion that the words of this will admit of no doubt or ambiguity, and that this is a clear instance of an annuity being given for life only. Now, the distinction, I apprehend, is quite clear, which is this—that where the produce of a fund is given which is producing a permanent income, and the produce of that fund is given, then that is a permanent annuity; but where an annuity is given to be secured upon a permanent fund, then it is only an annuity for a person's life. Now, the question in this case is, what is given? He gives, in the first place, all his property to his executors, which does not, in my opinion, affect the question at all, until you come to the words, 'I desire.' He says, 'I desire that my executors shall purchase annuities for each of my two sisters, namely, Mrs. Eliza Burns, of Thurles, Ireland, and Mrs. Helen Fitzpatrick,

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Elmsley and *F. Riddell*, in support of the appeal. We submit that although this is a gift of an annuity of 100*l.* a year, without words of limitation, yet that when we look at the following part of the will, which provides the fund for the payment of the annuity, this makes it a permanent annuity consistently with the authorities. There is a dedication, in the first instance, of the proceeds to arise from the sale of the real property; and then, if that should not be sufficient, of the whole personal estate; and the residue is given expressly subject to the legacies and annuities. *Heron v. Stokes*, 2 Dru. & W. 100, and on appeal, 12 Cl. & Fin. 161. Although, in the present case, part of the property that was dedicated to the payment of the annuities was withdrawn by the codicil, yet that cannot affect the question of construction.

[LORD CHANCELLOR. No one will dispute that, I think.]

This is as much a perpetual annuity as that to the hospital, for the

of Killenall, Ireland, of 100*l.* a year each.' Now, if it had stopped there, no question whatever could have arisen, but that what was given to them was an annuity; and it appears to me the more important to stop there, because you must look to what the gift is.

In all the cases which have been cited, there was a gift of the fund itself, which was producing a perpetual sum; and therefore the important distinction, if you stop at this place, is, that in one case, you are giving the produce of a fund which is a permanent, an existing fund, and in the other you are giving an annuity; and the only words upon which this can be supported, if at all, are these, — 'the said annuities to be purchased in the British funds.' Well, the gift, if I have come to a right conclusion, is of a sum for life. How is that, then, to be secured? It is to be secured by purchase in the British funds. But that is not giving the produce of a sum of money in the British funds, belonging to the testator, to these persons for an indefinite period, which is a different thing; but it merely describes in what manner this annuity, which is an annuity for life, is to be turned into the produce of a fund which does not exist. If he had intended to give them so much stock as would produce 100*l.* a year, a very different set of words would have been employed, according to the ordinary acceptation of the words used by persons in ordinary parlance. If he had stated that he had certain money in the funds, and that he had given that to his executors, to be divided in certain proportions, and to pay 100*l.* a year to Mrs. Burns and Mrs. Fitzpatrick, another question might arise.

But the question here is, whether, it being in the first instance, upon the earlier authorities and upon the ordinary meaning of the words, a clear annuity for life, the fact that that annuity is to be paid out of a permanent income enlarges that into a permanent annuity. Now, I am of opinion that it does not, and that no case that I am acquainted with, or that has been cited to me, amounts to a decision to that effect; it is merely stating how the annuity is to be secured, and that the fund out of which the annuity was to be paid might become a permanent fund, without the annuity itself becoming permanent. The words of the residuary gift do not affect, in my opinion, that conclusion. He has directed that all the residue of his property, shall be turned into an annual income for a permanent corporation. No doubt that is a perpetual gift; it is an annual income, to go on as long as that corporation exists: it is a gift of it entirely to that corporation. There may be a question upon that, whether he thought that the corporation would have the power of disposing of the corpus of the fund; that may have been the intention of the testator, and he only intended that they should have the disposal of the fund, as long as the corporation lasted; and, in that view, the words used by the testator have a plain and intelligible meaning.

I should have been very glad to have come to a different conclusion, but I entertain no doubt that this is an annuity for life, and not a permanent annuity, to these ladies; and of course, if it is so to them, it is so to all the others."

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executors would equally have had to invest the residue in the funds; and the only difference in the words of gift is, that in the latter it is "annual income," and in the former "annuity."

[They referred also to *Blewitt v. Roberts*, Cr. & Ph. 274.]

Lloyd and *Busk*, for the plaintiffs, the trustees, took no part in the argument.

R. P. Roupell and *Cairns*, for the residuary legatees.

Roupell. The subject-matter of this gift is an annuity, not property, and the direction to purchase it in the funds is a mere direction to purchase the annuity. But what is to be the duration of that annuity must be determined by the gift. I submit that a gift of an annuity simpliciter is only a gift for the life of the annuitant. Now, every such gift must have a fund to secure it; but it is clear that that circumstance does not make such an annuity permanent. It is clear also that a gift of an annuity by annual payments, to be paid out of a particular fund, does not amount to a gift of the fund itself. *Wilson v. Madison*, 2 Y. & C. C. C. 372; s. c., 7 Jur. 572.

[LORD CHANCELLOR. There the gift was not of the fund, but of the "interest" of the fund. There could have been no doubt of that case.]

I cite that case, and the case of *Innes v. Mitchell*, 6 Ves. 464, for the purpose of showing that the words which were then used were held not to be sufficient to connect the words of gift with the property which was appointed to secure the annuity. The cases of *Rawlings v. Jennings*, 13 Ves. 39; *Stretch v. Watkins*, 1 Mad. 253; and *Clough v. Wynne*, 2 Mad. 188, are instances of cases where it was held, not that the annuity was perpetual, but that the gift applied to the property yielding the annuity. *Heron v. Stokes* (*ubi sup.*) is not analogous to the present case, for there it was not a simple gift of an annuity, but of property; and the question there was, whether the testator intended to give property to such an amount as would yield 100*l.* a year, or only an annuity.

[LORD CHANCELLOR. It was not so argued: it never was supposed that the annuity was not intended to be given.]

It was argued as if the intention was to give the property: it was not the case of an annuity to be purchased, but the question was, whether the property was given in connection with the annuity. Here the subject of the gift is the annuity, not the property. Suppose the will had stopped at the direction that this annuity should be purchased, without saying more, would not that have meant for the life of the annuitant? Then does the direction by the testator, that you are to purchase "in the British funds," alter the matter? Would it not be a purchase in the British funds if an annuity for the life of the annuitant was purchased? There is no direction to purchase in any particular fund. I submit that there is here no gift of the fund, so as to turn this annuity into a gift of so much property as will yield 100*l.* a year.

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doubt. If I had no doubt I ought to have withdrawn my opposition; but it is very probable that my view of the case will turn out to be incorrect.

KNIGHT BRUCE, L. J. I am not sure that I differ from the Master of the Rolls, or from my Lord Cranworth, in the view which either of those learned judges has taken of this case, except in a single point—namely, the applicability to it of the case of *Heron v. Stokes* as an authority; and I particularly wish to guard myself from being understood to insinuate how I should have been disposed to deal with the present case if that of *Heron v. Stokes* had not existed. The case of *Heron v. Stokes*, as to this point, had the concurrence and decision of the very high authority of the Lord Chancellor of Ireland first, and of the House of Lords afterwards; and it was held by both, one of them the supreme judicature of the realm—we must assume that to have been the opinion of the House of Lords because it seems to have been so expressed by every noble and learned lord who gave an opinion in the House of Lords upon the subject—that the wife of the testator, as she was held to take a perpetual annuity under the will and codicil, would have taken a perpetual annuity under the will alone, independent of the codicil. I feel myself unable to say, that if that, which must be taken to have been a right decision, and probably was a right decision—I feel myself, I repeat, unable to say, from that authority, that this lady does not also take an absolutely perpetual annuity; and therefore upon the authority of *Heron v. Stokes*, repeating that I do not mean to insinuate what I would have held if that case had not existed, I feel myself bound to say that this lady does take a perpetual annuity.

LORD CHANCELLOR, (Lord St. Leonards). This case turns upon the true construction of this testator's will, and the question upon it is to be governed by the rules of law. I do not apprehend that the general rule of law admits of any doubt. It is perfectly settled and agreed upon, that if an annuity be given simpliciter to one generally, a life interest only passes. It is equally, I believe, undisputed, that if an annuity be directed to be provided out of the proceeds of property, or out of property generally—if an annuity is to be brought into existence by the application of property, and that is given to a party generally, the party would take the property appropriated to purchase the annuity, and therefore would take the annuity in perpetuity if it were purchased; and if you take *Heron v. Stokes*, you will find the gift there was much more difficult to manage. I apprehend, then, the gift here would be according to the construction I think it ought to receive.

In *Heron v. Stokes* the testator says, "My will is, whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be in any way entitled to, shall produce to my wife an annuity of 100*l.* per annum; to each of my daughters 100*l.* per annum, themselves and their children." Now, what did that mean? Might it not mean one of two things—either that they

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should set apart so much of the property as would produce 100*l.* a year, or that they should do it out of the proceeds, which would be the more rational intention and construction — not to set it apart? You cannot set apart any given property just to the amount that would produce 100*l.* a year, but you may raise so much money as will purchase 100*l.*, the exact sum; and therefore the more probable and proper construction of that is, that an annuity was given to her of that amount, to be produced on the application of a portion of the property; and upon that ground it is, I apprehend, speaking for myself, that I thought those words sufficient to create a perpetual annuity, if I may use the words; and, I suppose, upon the same ground, for no other was mentioned, the law lords who advised the house, when the case went up by way of appeal, decided the case — they all expressed their opinion in favor of the same construction.

Now, if upon this will you could find an intention expressed, not simply to give an annuity to this lady, in mere words of donation, but that an annuity should be purchased for her, and that money, when that purchase is to be made, is out of the *corpus* of his property, then I apprehend it is an annuity which is to exist in the way in which it is to be purchased, namely, general and perpetual; and that, in effect, therefore, it would cost 3,000*l.* — that sum must be invested — to produce the annuity; and the party would be entitled to the annuity, or you might make an election to take that principal sum, which will be required to be invested in order to produce the annuity; and the simple question upon the construction of this will is, what was the testator's intention?

Now, I wish to observe, that what this court may decide upon this question has not the slightest bearing, in point of authority, against the general decision of the Master of the Rolls. I wish it to be understood that we are expressing no opinion against the decision of the Master of the Rolls upon the other annuities, and that our attention is directed, as it ought to be, only to that particular case which has been selected, manifestly from the whole list, as a favorable case to bring, by way of appeal, to this court; but we give no opinion whatever as to the decision with regard to the other annuities, some of which may very probably be considered to stand upon very different grounds.

Now, this testator, nowhere, in the course of his will, adds to any of his gifts words of limitation; and it was only with reference to a married woman, in the first instance, when he gives her 3,000*l.*, that she is to have it, to hold the same independent of her husband, and to be disposed of by her will, properly signed and executed. That is the only instance throughout this will in which he looked to any act of the party; for in the very case of the landed property which he devised to be sold, he used no words of inheritance; and in the gift to the hospital he says, "an annual income shall go to the cancer ward" — no words of perpetuity. In no one instance does he use the words of limitation in the gift to the party, or words of perpetuity; but we have this, no doubt, by the common intention which has been so often stated. To give a man your house, you mean him

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to take it absolutely, just as if you gave him your horse; and as to a disposition such as I have noticed, of the gift of a house, the effect of passing the inheritance, unless the gift is restrained, certainly meets the general impression of the public, and makes a gift of a house just as operative to pass the inheritance as the gift of a horse in passing the absolute interest in it; and the authority of parliament, in giving effect to what is the general impression of mankind, ought to have an influence in cases of this kind, where the will is fairly open to the construction that the absolute interest does pass, if (although the words were used generally) you could collect the intention.

Now, let us see how the property was disposed of. Having given the legacies in the way I have mentioned, he then proceeds—"I leave to her sister, Jane Symes, and the Rev. Mr. Lagier, husband of the aforesaid Frances Lagier, the sum of 1,000*l.* each;" he gives to them a legacy also, and then he proceeds—"I desire that my executors shall purchase annuities for each of my two sisters, namely, Mrs. Eliza Burns, of Thurles, Ireland, and Mrs. Helen Fitzpatrick, of Kilenall, Ireland, of 100*l.* a year each, the said annuities to be purchased in the British funds." Now, he does not stop there, because, if you look to the subsequent part of the will, after having given other legacies and annuities, he says—"I direct my landed property at Otham to be sold by auction, and the produce thereof to go to the carrying out of the aforesaid annuities and legacies." Now, how is the produce "to go to carrying out the aforesaid annuities and legacies?" The landed property is not deducted out of the annual proceeds to pay the annuities and the legacies, but the landed property, without words of inheritance, is to be sold, and the produce is "to go to the carrying out of the aforesaid annuities and legacies." What is "carrying out the aforesaid annuities and legacies?" He never meant that there was to be a continued payment of the annuities, but he meant that a certain portion of that produce should be applied to the purchase of annuities for these two ladies, in the British funds; that was his intention.

Now, if we go a little further, he says, "And should the produce of the same be not found sufficient for that purpose," that is, for the purpose of producing the annuities, "I desire that the remainder," that is, the money wanted, "shall be made up from my personal property." He there directs all his personal property, which he mentions that he had abroad, to be sold, actually to be converted into money. "After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3*l.* per cent. consols, for the benefit of a cancer ward in the Middlesex Hospital." Now, observe what the effect of that is—that should the real estate fall short of being sufficient to effect the annuities, that is, to purchase the annuities, and carry out the aforesaid annuities and legacies—carrying out the legacies to pay them—then he resorts to his personal estate, and then so much is to be taken from the personal estate as will effect the annuities and pay the legacies. The words are not exactly accurate in that latter sentence, but, of course, that goes for nothing; the sense is manifest, and

what words come first and what words come last in such a sentence is utterly unimportant. Then he says, "I desire the rest of my personal property shall be laid out in the purchase of an annual income." Has he not, therefore — whatever be the effect in law of particular annuities falling into the residue, for we have nothing to do with the question now, I am looking at the intention of the testator — has he not expressed, as clearly as a man could express, an intention that these things shall be all separated from the corpus of the property, and what remains, after paying the legacies and effecting the annuities, shall be money in hand, to invest in consols? And if that be so, then they must have been annuities to be purchased, and purchased with the produce.

Without entering into the consideration of the question as to the purchase in the British funds, it is a case in which the testator has given an annuity to one — an annuity to be purchased out of the produce of his estate; and the rest of his estate is to be applied to another object. Therefore the produce of his estate is, in this view, altogether cut off from the rest of the property, and dedicated to this particular purpose. Well, if an annuity be dedicated to a particular purpose out of a man's estate, I hold it to be clear law that that individual would take the absolute interest, because it is, in effect a dedication of a portion of the corpus of the man's property to produce the particular benefit. Looking at the view I have of the general import of this will, I feel no difficulty as to the direction to purchase in the British funds. I consider this will infinitely more difficult to deal with, in order to fix a life annuity in this particular case, than in *Heron v. Stokes*. I do not know whether I have correctly expressed myself, but I think in *Heron v. Stokes* there was more difficulty in holding, upon the words, that there was a general intention which would pass the annuity perpetually, than there is upon the words of this will — that is what I mean.

Now, then, as to the particular trust: he says, "I direct that my executors shall purchase annuities for each of my two sisters" — naming them — "the annuities to be purchased in the British funds." Now, in the first place, you will observe that here is no direct gift to the parties of an annuity: it is not a simple gift to the parties of an annuity, but it is a gift by way of direction to purchase the annuity for them — not a word is said about their lives. Now, where is the improbability, in a general case, if you direct that an annuity is to be purchased for a party with the proceeds of your property, that that is meant to be a permanent annuity? Is it to be supposed, that because the testator says, "I desire my executors to purchase an annuity for each of my sisters, to be purchased in the British funds," that that means in the Government funds, out of which you may make a purchasable annuity? Now, in the first place, I can see nothing upon the face of this will — I am sure whatever I say is with the most unfeigned respect and deference to the opinion of my Lord Cranworth, whose assistance I have upon the present occasion — I am speaking freely what my own opinion is; at the same time I am speaking with the most sincere respect for an opinion entitled to so

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much weight, which has a different bearing against my own—I must find upon the face of this will, in order to confine it to a life-interest—looking at every other part of the will which tends to a contrary construction—I must find something specific to compel the court to say that buying in the British funds an annuity for these parties means to buy a Government annuity under particular acts of parliament. Now, those acts of parliament are fenced down with all sorts of difficulties, and I cannot think that this gentleman had any such intention; if he had, he would have so expressed it. Nothing would have been more easy than to have said, “Buy for her life.” If he had meant it, then the words would have been “in the Government funds.”

Now, I must give (as I have always endeavored to give in other cases) a sound and sensible construction to the words which are here used. What is the meaning of “British funds?” Can it mean that which is contended for? Let us see what the nature of that is. The commissioners for the Reduction of the National Debt are authorized to take stock from persons willing to treat with them, or to take money from those parties; but that money is to be converted into “British stock;” and when they have got that British stock, of course it goes in satisfaction of the National Debt; and then the purchaser is to have—what? An annuity secured upon the Consolidated Fund. You may give British funds in exchange, by the express direction of the act of parliament, for such an annuity; but no man can predicate that a charitable annuity is payable out of British funds, in the sense that is here used. “British funds” does not mean “British money,” because there is no such thing. “British funds,” of course, means the public funds; and he had got funded property in other countries, and therefore he says “British funds,” and not “foreign;” but “the funds” means, in common parlance, (I must give this man’s expressions their natural import,) the funds of England—“British funds.” Then, if a man buys such an annuity of the Government, he has not bought an annuity in the British funds, but has bought an annuity that is payable out of the Consolidated Fund.

Now, the Consolidated Fund is money raised by the authority of parliament to pay the British funds themselves. The British funds are nothing but perpetual annuities, redeemable; and the very money out of which these ladies’ annuity had been purchased would have been payable, not out of the British funds—public property—but out of the very accumulation of the Consolidated Fund applicable to the payment of debts; and therefore it is so clearly contradistinguished, the one from the other, that I cannot consider this gentleman, by any latitude of language, as applying “British funds” to a Government annuity. Then observe the difference. Why, there is this difference between “British funds” and “Consolidated 3l. per cents for the benefit of the cancer ward.” He wants to purchase for each of these ladies a particular annuity. He says, “Buy that annuity in the British funds”—to him it is indifferent whether it is bought in the 3l., 4l., or 6l. per cents—“buy that annuity.” But when he comes to deal with the residue, which is a fund applicable—

In re Halliday's Estate; Ex parte Woodward.

wholly applicable — to the particular charity, then he designates this fund by "the 3l. per cents." He is indifferent, because they are to have that income forever. In the other case, "I desire you will buy an annuity for each of those persons out of the produce of my property, before you divide the residue of that property, and buy it in any of the "British funds." Then "British funds" is used there in its ordinary and proper sense. You cannot buy a life-interest in a property: you must buy the particular amount of stock which would produce, for example, 100l. a year. When that is bought it is a perpetual annuity — when that is bought, that is the subject which is given to these ladies; so that he has directed that to be purchased which will endure perpetually, and he has given the subject so directed to be purchased for this lady without confining her to a life-interest.

That is my clear and my confident opinion. I cannot restrain the expression of that opinion, because I so strongly entertain it; but I need not again repeat it, and I say it with the greatest possible respect and deference to the opinion entertained by Lord Cranworth, and the doubt expressed by Sir J. L. Knight Bruce. I think it may be accounted for. I should not be at all satisfied that the Master of the Rolls might not himself have agreed with the court in his construction, if this particular case alone had been brought before him. I am not at all satisfied of that.

In re HALLIDAY'S ESTATE, ex parte WOODWARD.¹

November 24 and 25, 1852.

Infant — Custody of Infant under seven Years of Age, as between Husband and Wife, living separate.

The stat. 2 & 3 Vict. c. 54, has introduced, as controlling the paternal right to the exclusive custody of his infant child, two considerations, namely of marital duty to be observed towards the wife, and of the interests of the child to be consulted. But if these two objects can be attained consistently with the father's retaining the custody of the child, his common-law paternal right will not be disturbed.

THIS was a dispute between husband and wife for the custody of their infant child of four years of age. The father had been a cow-keeper at Hampstead, and was now a clerk in the Telegraph Office at Crewe, at 18s. per week; the mother was a charwoman at Hampstead. Each accused the other of drunkenness and dissipated habits; and, in addition, the wife accused her husband of adultery. It appeared that they had lived together at Hampstead happily enough

¹ 17 Jur. 56.

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until about a year previous, when a legacy of 540*l.* had been left to the wife, which it was alleged the husband had since squandered in dissipation. The money being all gone, and his wife becoming chargeable to the parish, he was taken up for deserting his wife, convicted, and sentenced to six weeks' imprisonment. Shortly after coming out of prison, he made his way, in the absence of his wife, to the lodgings where she was living, maintaining herself by going out as laundress, &c., and took away their child. He refused to state what had become of it, except that it was at board in Essex; but allowed his wife out of his salary 5*s.* a week towards her maintenance. The wife now presented a petition under the 2 & 3 Vict. c. 54, for the custody of the infant.

Hardy, for the petition.

Selwyn, for the husband.

Hardy, in reply.

In re Spence, 2 Ph. 247; s. c. 11 Jur. 399; *Warde v. Warde*, 2 Ph. 787; and *In re Fynn*, 2 De Gex, 457; s. c. 12 Jur. 713, were cited.

The facts and arguments, so far as not contained in the above summary, sufficiently appear in the judgment.

TURNER, V. C. The question in this case is undoubtedly of very great importance, and not the less entitled to the attention of the court because the parties who raise it are of low condition. Perhaps no question brought before the court is more difficult to be dealt with than the preservation of the relations and rights of parent and child, and of husband and wife, with respect to the children. The question is raised by the petition of the wife to have delivered to her the custody of a child under seven years of age, under the act 2 & 3 Vict. c. 54, the 1st section of which empowers the court, "upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if the court shall see fit, to make order for the access of the petitioner to such infant or infants, at such time and subject to such regulations as the court shall deem convenient and just, and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as the court shall deem convenient and just." It will necessarily be important, in the first place, to look at the principles on which the act proceeds. When this act came into operation, it was the undoubted law of the country that the father is entitled to the sole custody of his infant child, controllable only by this court in cases of gross misconduct. With this right the act does not, as I understand it, interfere, so far as to have destroyed the right, but it introduces new elements and considerations under which that right is to be exercised.

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The act proceeds upon three grounds. First, it assumes and proceeds upon the existence of the paternal right. Secondly, it connects the paternal right with the marital duty, and imposes the marital duty as the condition of recognizing the paternal right. Thirdly, the act regards the interest of the child; for on no other grounds can I account for the distinction taken between the cases of children above and under seven years of age, it being perfectly obvious that the comfort of the mother was as much affected whether the child were over or under seven years of age.

These three grounds, then — the paternal right, the marital duty, and the interest of the child — are to be kept in mind in deciding any case under this statute. And in confirmation of this view I may refer to *Warde v. Warde*, 2 Ph. 787, to the effect that the mother will be allowed to assert her right as a wife without injury to her feelings as a mother. On the true construction of the act, therefore, I think that the marital duty is imposed as a term controlling the paternal right. On the extent of that right, as it originally existed at common law, no one entertains any doubt. It was an unlimited right in the father, subject only to the control of this court in cases of gross breach of duty. It may be questioned, therefore, whether in this case any relief could have been sought independently of the statute.

I think there is very great difficulty in calling on the court to exercise its power to restrain a man in his legal right; because, assuming all the circumstances alleged against the husband to be true, they relate wholly to the past, and only prove that antecedently to May, 1852, he was living a life of idleness, profligacy, and drunkenness: but they fail to prove that since May there has been any such idleness, profligacy, or drunkenness as to warrant the interference of the court. It is not because a man has at one time been guilty of these habits that the court will at any future time interfere to deprive him of the custody of his children. Then, the only other ground would be his desertion of his family. That will make it necessary to examine into all the circumstances of the case with reference to the conduct and character of the parties, and also to consider how provision is made for the child; and, a provision being made for the child of 5s. per week, if the jurisdiction had not rested on the act, and on a proper observance of the marital duty, I do not think that the court would have interfered.

There are, however, two grounds on which the court has jurisdiction under the act, namely, breach of marital duty and the interest of the child. That Woodward did desert his wife previously to May, 1851, he does not deny, but he justifies the desertion as necessary. It is, therefore, incumbent to look into the conduct of the wife. The charge against the wife is that of habitual drunkenness. The affidavits in support of that charge, so far as they go to prove the habit, are founded on information and belief, but they go positively to instances of occasional intoxication. I am not here to see whether the charge be exactly true or not, but looking at the position in life of the parties, and admitting that the wife was guilty of occasional

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intoxication, the question is, whether such a course of habitual drunkenness is made out against her as to warrant the court in depriving her of the benefit given her by the statute, of the custody, that is to say, or of occasional access to the child. Now, I think, looking at the whole of the evidence here before me, that the charge of habitual drunkenness wholly fails, and that the affidavits sworn on the wife's side enormously preponderate over those sworn on the side of the husband. Among the latter is that of Mr. K. and his wife, and I think it my duty to say that I do not believe one statement contained in it. That affidavit seems to me to throw a shade on the whole of the evidence brought forward by the husband. But it is not necessary to draw the conclusion that the wife never was drunk, though I think this more likely than that he never was so.

What has been the conduct of the husband with reference to the child itself? In December, 1851, he deserted his wife, for which he was convicted and committed in 1852. Immediately after his discharge he goes to the house of his wife in her absence, takes possession of the child, and to this hour she never has been able to discover where or in whose custody the child is; and he does not now inform the court where the child is, except that it is at board in Essex. Is it, or is it not, in contravention of the marital duty, which the act has placed in competition with the paternal right, that the husband should thus take away his children, and keep them, without any communication with the mother as to the mode, or place, or circumstances of their maintenance? The natural right must be held to have been modified by this act, and the same opportunities must now be given to the mother as to the father of communicating with the offspring. Then there is to be considered the question of access only, or custody of the child. That depends on what is most for the interest of the child, in the position of the parties. The husband has 18s. a week, out of which he has to allow his wife 5s. The wife earns, in addition 5s. by her labor. There is here no such difference of means as to make it necessarily for the benefit of the infant that he should remain with the father rather than with the mother. But I shall decide, if possible, rather in favor of the paternal right than against it, and I, therefore, give now an option to the father to place the child to be taken care of where the mother can have access to it, and see that it is properly attended to, so that she may have the benefit intended by the act. Unless it be shown, by affidavit, on the next seal day, that this has been done, I shall direct the child to be delivered over to the mother.

 Egremont v. Egremont.

EGREMONT v. EGREMONT.¹

December 9, 1852.

Infant — Guardian ad Litem.

Guardian *ad litem* appointed to an infant defendant within the jurisdiction, without his appearing in court, and without a commission.

THIS was an application for the appointment of a guardian *ad litem* to an infant defendant within the jurisdiction, without his appearance in court, and without a commission. The application was made to their lordships at the suggestion of Sir R. T. Kindersley, V. C., before whom it had been made in the first instance, and who had declined to make an order, considering, that as the old practice was to send a commission to take the answer of the guardian, and the guardian was appointed by that commission, and commissions for the latter purpose were entirely omitted in the enumeration in the new statute, 15 & 16 Vict. c. 86, s. 21, of commissions intended to be abolished thereby, it was doubtful whether the court had jurisdiction to make the order proposed.

Nalder, in support of the application, said that an order to the effect proposed would save considerable expense, and that such an order had been made under the old practice by Lord Lyndhurst, C., in the case of *Grant v. Vause*, 2 Y. & C. C. C. 524; 7 Jur. 637.

A. Smith, amicus Curiae, said that the same order had also been made by the late Sir J. Parker, V. C., in the case of *Benison v. Worsley*, 17 Jur. 2, s. c. 13 Eng. Rep. 317.²

Their lordships made the order, upon the statement by Mr. Nalder, that the solicitor instructing him had made an affidavit to the effect that the proposed guardian was a fit person to hold the office, and had no interest in the matter in contest in the suit adverse to the interest of the infant.

¹ 17 Jur. 55; 22 Law J. Rep. (N. S.) Chanc. 108.

² See also *Stillwell v. Blair*, 13 Sim. 399; *Topping v. Howard*, 10 Jur. 629; *Peascod v. Tully*, 15 Jur. 663; s. c. 5 Eng. Rep. 127; and *Piddocke v. Smith*, 15 Jur. 1120; s. c. 8 Eng. Rep. 95.

In re Caddick's Estate.

In re CADDICK'S ESTATE.¹

January 31, 1853.

Equity Jurisdiction Improvement Act — Payment of Money out of Court on an Investment in Lands — Practice as to Execution of the Purchase Deed.

Lands having been taken for the purposes of a railway company, and the money paid into court, and other lands being approved of, to be purchased therewith, and to be settled to the like uses as the former lands : —

Held, that only one application to the court would be necessary for carrying this purpose into effect ; and that the draft conveyance, approved by the conveyancing counsel, being engrossed, with a blank for the date, and other particulars of the order, the court would make one order directing the blank to be filled up, and the contract to be completed.

THIS case had been on a previous occasion before G. J. Turner, V. C., 16 Jur. 965 ; s. c. 15 Eng. Rep. 319, when it had been ordered to stand over to approve of the title. The case was, that lands had been taken by a railway company, and the purchase-money paid into court. It was now wished to lay out the money in the purchase of other lands to be settled to the same uses as the lands taken by the company. The title had been approved of, and the draft conveyance settled by one of the conveyancing counsel, all but the recital of the order directing the final completion of the contract, and payment of the money out of court to the vendor. This recital had been left in blank by the conveyancer, as the order had not been then made ; and, in fact, was the very order now applied for.

Milman, for the application, cited *Harvey v. Brooke*, ante, p. 1, as involving a similar difficulty, being the converse of the present case.

WOOD, V. C. What was meant in that case, was, that the court should be satisfied that the engrossment should agree — as far as it could agree — with the draft that was settled. If I now make an order, that upon execution of that conveyance, which you now produce, the money be paid, the blank may be filled up before the final order is pronounced, which will be, that on the execution of that deed, so filled up, the purchase-money be paid out of court to the vendor. Your affidavit will be, that there is this blank in the conveyance, and that there is the same blank in the draft as settled. You can bring the engrossment into court, and then I will make an order which will fill up the blank.

Milman said that two applications would thus be necessary on every similar occasion.

WOOD, V. C. In fact, only one application will be necessary.

¹ 17 Jur. 84.

 Rodgers v. Nowill.

This present application would have been unnecessary, if it were not that you wanted directions what course to pursue. In future, the only application necessary to be made will be when the engrossment is ready for execution, all except filling up the date, and particulars of the order to be made for payment, which must of course be left in blank in the engrossment.

 RODGERS v. NOWILL.¹

January 15 and 17, 1853.

Injunction to restrain Use of Trade Mark—Contempt—Acquiescence.

Where plaintiffs had asked and obtained a decree for an injunction to restrain a defendant from using one of twelve trade marks, which they stated were all their peculiar marks, all such marks being a common name, with various additions; and the defendant, after the decree, had entered into a partnership bearing that name, which was the principal part of the prohibited mark, and that partnership used the prohibited mark for five years without interruption by the plaintiffs; although this was a violation by the defendant of the letter of the decree, yet, considering all the circumstances, and particularly the acquiescence by the plaintiffs, and their own low estimation of the value of the right protected, and that they had not proceeded against the defendant's alleged partners, the court refused a motion to commit the defendant for breach of the injunction, but without costs.

THIS was a motion to commit William Rodgers for breach of the perpetual injunction awarded by J. Wigram, V. C., to restrain him from using the mark, "V. (crown) R., J. Rodgers & Sons," upon penknives, pocket-knives, and other articles of cutlery, or any other mark or marks so contrived as, by colorable imitation, or otherwise, to represent that the penknives, &c. manufactured or sold by the defendants, John Noill and William Rodgers, were the same as the penknives, &c. manufactured by the plaintiffs; and that William Rodgers might pay the costs of the application. The injunction was granted at the hearing of the cause, and the facts upon which the decree was made are fully reported, 6 Hare, 325, and 17 Law J. Rep. (N. S.) C. P. 52. The affidavit on the part of the plaintiffs stated that the defendant William Rodgers had been in the habit, since the decree, of making and selling cutlery marked with the prohibited trade mark, with the colorable addition of the words "celebrated cutlery" stamped underneath the words "J. Rodgers & Sons;" that the prohibited trade mark was generally known as the trade mark of the plaintiffs, and that the words "celebrated cutlery" would be generally understood to mean cutlery of the celebrated Rodgers, namely, the plaintiffs. On the part of the defendant it was sworn that he had been for about five years in partnership with his father, John Rodgers, and his brother George, as manufacturers of cutlery, and that

¹ 17 Jur. 109; 22 Law J. Rep. (N. S.) Chanc. 404.

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the goods of the plaintiffs were distinguished from theirs by the addition to the said trade mark, on the opposite side of the blade, of a star and cross — a mark which had been granted to the plaintiffs by the corporation of cutlers in Sheffield — and by their address added; that the defendants had been for five years manufacturing goods with the mark in question, without the star and cross; and that there were several firms of Rodgers who stamped that name on their cutlery. The defendant swore that he had not disobeyed the injunction, but had carried on business in partnership with his said father and brother, for five years under the name of "John Rodgers & Sons," and that his firm had used the stamps, "V (crown) R., J. Rodgers & Sons," and "V. (crown) R., John Rodgers & Sons," with or without some addition, but that they had never used the distinguishing marks of the firm of Joseph Rodgers & Sons; and that William Rodgers had never, since the granting of the injunction, manufactured or sold goods on his own account alone. Notices had also been given that the evidence used at the hearing would be referred to on either side.

Malins and *Shee*, for the motion.

Bacon and *Osborne*, contra, offered to undertake that the defendants' firm would always stamp "John Rodgers & Sons," instead of "J. Rodgers & Sons," or to refer the question to the arbitration of a local tribunal.

Malins, in reply, refused this offer.

STUART, V. C., said that this was a case of considerable importance, from the way in which it had been treated at the bar, and from the circumstances. The plaintiffs were in possession of a decree to prohibit the defendant, against whom they now moved, from using a certain trade mark. The defendant admitted that he had used this trade mark; and it would be almost a matter of course that the court should inflict upon him that punishment which any one violating a decree ought to sustain. But it was from circumstances of conduct on the part of those who had obtained the decree, and of the defendant against whom it had been obtained, that the difficulty of the case arose. The decree was pronounced by Sir J. Wigram, V. C., in 1847. It was a decree establishing the right of the plaintiffs to use one particular trade mark entered in the decree, and restraining the defendant from using that mark or any other trade mark calculated to impose on the public, by a colorable imitation thereof. But the pleadings in the cause, and the facts upon which this decree was obtained, were very remarkable. The pleadings stated that the trade mark protected by the decree was only one of twelve which the plaintiffs had been in the habit of using as their exclusive trade marks; and the plaintiffs, asserting their right to twelve, had only one of those protected by the decree; and what was more extraordinary, though they stated in the bill their exclusive right to twelve trade marks, the prayer of the bill asked only protection for that one which was protected in event by the decree.

On looking at the nature of these trade marks, the reason why the prayer of the bill extended only to one of them was obvious, because the most cursory observation of their nature showed that they were of such a kind that an attempt to protect them specifically would have been vain. One, for example, was simply the word "Rodgers," and the plaintiffs could not succeed in obtaining a decree of this court to protect them in the exclusive use of that name. The evidence that they had no such right was, that they did not venture to ask the court to protect it; and the decree did not so protect it, but had expressly given the plaintiffs a right to the protection of the court only for the one particular trade mark mentioned in it, or any colorable imitation thereof, which would impose on the public, or induce them to believe they were buying the goods of the plaintiffs.

His Honor said that he could not overlook the circumstances under which the decree was pronounced; and looking at them, he observed that the case had been brought before the court at the hearing, and under such circumstances that it was by a very narrow decree that the bill escaped dismissal, and it was retained for a year, with liberty for the plaintiffs to establish their title at law. That title the plaintiffs had subsequently established by the verdict of a jury; and having so established it, it was almost a matter of course that the decree, when the cause came on upon the equity reserved, should be in the terms in which it was. Then the circumstances of conduct, with reference to the violation of the decree by the defendant, involved matters of great importance with reference not only to this, but to other cases of the same kind.

The right to the exclusive use of trade marks, in order to exist as an availing right, which should entitle an individual using such marks to the protection of a court of equity, must be an exclusive right, in the use of which by other individuals the plaintiffs had never acquiesced. That was a principle well established, and perfectly consistent with justice and common sense. But in this case it appeared, that at the time when the cause was heard, there was a question about a partnership, whether it existed or not, which was of great importance. At the time of the decree it was a fact beyond dispute, that two other persons besides the defendant, William Rodgers, and who were not defendants in the cause, namely, John and George Rodgers, had been in the habit of using this trade mark which was protected by the decree. It did not follow, because one of three individuals, who had used the mark, was alone before the court, that there was not a right against that one, and accordingly relief was given against William Rodgers. The fact of the plaintiffs not bringing before the court the two other persons, was not, in the opinion of the court, a sufficient reason for resisting the remedy sought against William Rodgers only; but it introduced into the case this important fact, that other individuals of the public, than the one against whom the decree was pronounced, were using the trade mark which was protected by the decree.

His Honor did not say that that circumstance made it necessary for the plaintiffs to file a bill or take proceedings against those other two persons; but he thought, as their decree gave them a right against

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this individual defendant, though, from the extraordinary nature of the claim of the plaintiffs, stated in the bill, as contrasted with that in the prayer and with the decree, it was pretty plain that the right protected by the decree was not, in the estimation of the plaintiffs, a valuable right, yet, whether of great or little value, the court was bound to protect it, if an existing right. It was impossible, looking at the circumstances of the case, where the plaintiff had stated his right to twelve trade marks, and only asked and obtained protection for one, where it was so common a name as that which occurred in all twelve, that the right established by the decree could be of much value.

His Honor said, however, that that was not the only circumstance to consider. He must look at the circumstances of conduct, when called upon to commit an individual to prison for a contempt; because, if it should appear that the plaintiffs had made very little use of the decree, that would be a course of conduct which would amount to despising that decree on their part. It was said that the defendant was poor, and that the plaintiffs were rich; that was no justification for the defendant in violating the orders of the court; nor because the plaintiffs were rich should they be deprived of the protection which the court intended to extend to them. But it was important, when the plaintiffs came to a court of equity to protect a right which was evidently not of much value, to ascertain whether they had so dealt with their decree, and that there had been such contempt on the part of the defendant, as would justify the court in visiting him with the severe consequences of contempt. The first circumstance of conduct was, that if the plaintiffs had been vigilant in protecting the right which they obtained by the decree five or six years ago, they might have discovered, as it could not be doubted they well knew at the time of the decree, that other parties were doing the same thing as that which they sought to restrain the defendant from doing. If the plaintiffs had considered the right established by the decree to be a valuable right, and had exercised that degree of vigilance which they ought to have exercised, they might have discovered long ago that the very thing they now complained of was being done, and might then have prevented it, instead of coming at so late a period as 1853. His Honor did not say that that alone was a reason for refusing the present application, but it was a circumstance to which the court was bound to attend when it was asked to visit upon this defendant the extreme penalty due to his conduct.

Another circumstance was, that this trade mark had been used, not only before the decree, but since, without any proceedings being taken against any one except this man, who was so poor, that, in order to escape the costs incurred, he had been obliged to take the benefit of the Insolvent Act. This acquiescence since the decree, his Honor said, was a still stronger reason for him not to proceed by way of penalty against this individual, because the plaintiffs might have had knowledge, by due diligence, of these proceedings long ago. That was very material for the consideration of the court in an application of this kind. Upon another circumstance there was conflicting evi-

dence. It was said, on behalf of the defendant, and the evidence went to prove, that no one had been imposed upon by this defendant in using the trade mark mentioned in the decree, and that therefore the substance of the plaintiff's case, that the object was to protect themselves against the injury which would arise from persons being imposed upon, had failed. It was also said that the conduct of the defendant, though a violation of the letter of the decree, was not a violation of its spirit. On this point there was conflicting evidence from the affidavits. In the opinion of some of the witnesses the conduct of the defendant in using this trade mark amounted to a violation of the spirit of the decree, and made persons who bought goods with that trade mark of the defendant believe that they were buying goods manufactured by the plaintiffs.

Upon the balance of the evidence, it was impossible to overlook this important fact, that the plaintiffs were the most celebrated cutlers who used the name of Rodgers in Sheffield. Wherever that name occurred in the sale of cutlery in Sheffield, the public would suppose that it was the manufacture of the most celebrated house of that name, and no other. The evidence was conclusive to show the opinion of some of the witnesses, that there was likely to be an imposition on the public. His Honor said that he could not separate that evidence from connection generally with the name of Rodgers, as a name which, if used at all on cutlery, was calculated to induce the public to believe that it was manufactured by the plaintiffs. The name was a common name, and his Honor could not hold that the simple use of the name of Rodgers would be a violation of the decree if that name were stamped on the blades of knives or cutlery. The evidence was not conclusive on either side. It was most important that the defendant stated expressly, and was not contradicted, that he had taken precautions that the use which he had made of this mark should be such as should not impose upon the public, and induce them to believe that the cutlery was the plaintiffs'. That was sworn to with circumstances. The observation that the public would believe, from this mark, that the cutlery was the manufacture of the celebrated Rodgers, was of some force, but not of sufficient to induce the court to enforce against William Rodgers the extreme penalty of a contempt.

There was another circumstance. Two offers had been made by William Rodgers, and rejected by the plaintiffs. They were both fair offers, but not such as the court would hold the plaintiffs bound to accept. One of these was, to refer the question to the consideration of a local tribunal in Sheffield. The other offer was, never to use the name of "Rodgers" without the word "John" being stamped before it, so as to distinguish it from the firm of "Joseph Rodgers," which was the firm of the plaintiffs. The latter of these offers was sanctioned by the opinion of Sir J. Wigram, V. C. He had said — "I may observe, that whatever the fate of this suit may be, the defendants, if they desire to avoid further litigation on the subject, have only to add their residence or place of business, or to add the name 'John' before 'Rodgers & Sons.'" Both, or at least the last,

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of these had been offered, and that offer rejected by the plaintiffs and that was a circumstance of great importance, and not to be lost sight of by the court in disposing of the present application. The plaintiffs were not bound to accept it, but the defendant's having made it was, in the opinion of his Honor, a circumstance to entitle him to the merciful consideration of the court.

It was, however, pressed, that still there was this decree, and that there was an express violation of the right thereby given. The answer was, that the application came after six years, during any period of which the plaintiffs, by the exercise of due vigilance, might have come before the court with a similar motion. It was urged that this was not a vindictive proceeding, but one to which the plaintiffs were driven to support their rights, and that they had no other way, considering the individual with whom they deal. But his Honor thought that they had been so lax in the matter, that if the defendant was allowed to go on for some years, and other people were also doing the thing sought to be prevented, his Honor could not say that he was then to be visited with the extreme penalties of a contempt, as the right appeared not to be of great value. After it had been established by decree, it was thought of so little value by the plaintiffs themselves, that the defendant had pursued the course of conduct complained of by what his Honor must consider an acquiescence in the acts of other individuals, and of the defendant himself. His Honor could not assist the plaintiffs, at this stage of the business, in the manner asked. On the other hand, he could not see the defendant violating this decree in the letter of it without expressing his regret that he should pursue that course of conduct; and therefore, in refusing the motion, to mark his sense of the defendant's conduct, he would refuse it without the costs, which otherwise he would have given.

CROFTS v. MIDDLETON.¹

January 31, 1853.

15 & 16 Vict. c. 86 — *Evidence — Examination of Defendant abroad.*

Where a defendant, whose evidence it was desired to take, was resident in Australia, and it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first-named examiner being capable; and liberty was, in the same order, reserved to the principal defendant in the cause, to appoint some person in the colony to attend the taking of the examination on his behalf.

E. F. Smith moved, in this case, for the appointment of examiners to take the examination of a defendant, *Beale*, who was in Australia. There was some degree of nicety in the case, as it was not known in

¹ 17 Jur. 112.

Crofts v. Middleton.

what part of Australia the defendant would reside, and it was therefore requisite to apply for the appointment of an examiner in Melbourne, and another in Adelaide. The terms of the notice of motion were as follows: — "That in case the above-named defendant, John Beale, shall be resident at or near Melbourne, in the colony of Victoria, or in case the examination of the said defendant can be conveniently taken at Melbourne aforesaid, or in the said colony, John George Forbes, of Melbourne aforesaid, Esq., barrister at law, may be appointed an examiner to take the examination of the said defendant, John Beale, in this cause, as a witness proposed to be examined on the part of the above-named plaintiff; and in case the said John George Forbes shall die, or cease to reside within the said colony of Victoria, before the taking or completion of the evidence of the said defendant, John Beale, or shall decline or be unable to take the same, that George Milner Stephen, of Melbourne aforesaid, be appointed an examiner for the purpose of taking the said examination of the said defendant; and in case the said defendant, John Beale, shall be resident at or near Adelaide, in the colony of South Australia, or in case the examination of the said defendant can be conveniently taken at Adelaide aforesaid, or within the said colony of South Australia, that J. M. Skipper, of Adelaide, in the said colony, gentleman, be appointed an examiner for the purpose of taking the examination of the said defendant; and in case the said J. M. Skipper shall die, or cease to reside within the said colony of South Australia, before the taking or completion of the evidence of the said defendant, or shall decline or be unable to take the same, that William John Wren, of Adelaide aforesaid, gentleman, be appointed an examiner for the purpose of taking the said examination of the said defendant."

E. F. Smith stated that Sir G. J. Turner, V. C., before whom this matter had come in a former stage, had been in favor of the jurisdiction to make the order, relying on the 15 & 16 Vict. c. 86, ss. 28, 36. The application also was to have some person appointed, on behalf of the defendant Middleton, to attend at the taking of the evidence. He referred to 1 Dan. Ch. Prac. 906, and to the recent act, sects. 28 and 36.

Wood, V. C., made the order according to the terms of the notice, with the following addition as to the latter part of the application: — "And let the defendant Middleton name in the order an agent in each of the places where the examination of the witness may be taken, to whom notice of the examination is to be given, and order that service of the notice of examination of the witness on the agent where the examination takes place shall be good service; and, in default of the defendant naming such agents, let an order be made according to the terms of the notice."

J. V. Prior, for the defendant Middleton, offered no opposition.

Lockwood v. Fenton.

LOCKWOOD v. FENTON.¹

December 5, 1852.

Guardian of Infant in America.

The court refused to appoint an English guardian to an infant residing with his mother in America, without associating the mother in the guardianship, or to order the payment of an annual sum to the English guardian, until a communication had first been made with the mother on the subject.

THIS was a petition of William Lockwood, an infant, by his next friend, and of William Lockwood, his uncle, that the last-named William Lockwood might be appointed guardian of the person and estate of the infant, and, as such guardian, might be allowed the sum of 70*l.* a year, for the maintenance and education of the infant; or that, after communicating and arranging with the infant's mother, and other necessary persons, relative to the care and maintenance of the infant, the said William Lockwood, the uncle, might be at liberty to apply for an allowance for the past and future maintenance of the infant. The infant's father was dead; his mother was a menial servant resident in America, who had married again, since the death of her former husband, but was living separate from her present husband; and her son, the infant, was living with her. The only property to which the infant was entitled was a sum of 3,000*l.* stock, which was in court in this cause.

Malins, Q. C., and *Humphry*, for the petition, cited *Stephens v. James*, 1 My. & K. 627.

Kenyon Parker, Q. C., and *Rasch*, for the defendants.

STUART, V. C., said that he thought the mother should be associated in the guardianship. His Honor did not feel inclined to give the English guardian the income, as prayed by the petition, until he was satisfied that he had properly communicated on the subject with the infant's mother. The order was for the appointment of William Lockwood the elder, and the infant's mother, his joint guardians; and the question of the amount and manner of payment to be made to the guardian was adjourned, to be considered in chambers.

¹ 17 Jur. 127.

In re The Banwen Iron Company. — Drew v. Long.

In re THE BANWEN IRON COMPANY.¹

December 1, 1852.

Practice — Saving Motion.

Daniel and Freeling, for the motion, asked that it might be saved until the next seal. They submitted, that this being the day for which notice was given, they had, by custom, a right to save it.

Malins, Q. C., Bilton, and Glasse, Q. C., contra, were ready to proceed, but they acknowledged the custom.

STUART, V. C., said that he thought it was the custom that counsel, on the first day for which the motion was fixed, should be at liberty to save the motion.²

DREW v. LONG.³

February 19, and March 5, 1853.

Practice — Motion for Decree — Short Cause.

IN this case, notice of motion for a decree had been given under the 15 & 16 Vict. c. 86, s. 15, and the motion had been set down by the registrar amongst the causes; and on the 19th February,

Terrell applied to have it brought on before the causes, and argued that there was to be a separate list of these motions, under the 37th order of the 7th August, 1852, the object of the acts of parliament being to avoid delay.

KINDERSLEY, V. C., said that KNIGHT BRUCE, L. J., had decided that motions for decree were in effect causes, and must be set down in the cause list; and this motion must, therefore, keep its place.

The motion was then set down as a short cause, and was called on on the 5th March.

Terrell opened the motion, and said that the point to be decided

¹ 17 Jur. 127.

² See Daniell, 1459.

³ 17 Jur. 173.

Bateman v. Cooke.

was very short, and that it was of the utmost consequence that it should be immediately decided.

Saunders appeared on the other side, and said that the cause would occupy considerable time.

KINDERSLEY, V. C. I think that whenever the counsel on the other side says that it is not fit for a short cause, that is conclusive, or else I must hear a long argument as to whether it is a short cause. If it is pressing, you may apply to have it advanced; but I cannot hear it now, and it must keep its place on the list.

BATEMAN v. COOKE.¹

February 16, 1853.

Chancery Amendment Act, s. 22.

Affidavits properly sworn in a Colony, before the Chancery Amendment Act came into operation, are within the 22d section of that act; and it is unnecessary to prove the signature of the commissioner of affidavits to make them evidence.

Elderton mentioned this case, which had also been referred by the lords justices to the full court. The point arose upon the 22d section of the 15 & 16 Vict. c. 86. The question was, whether that section was to have a retrospective effect. Affidavits in the suit were sworn at Bathurst, in Australia, before the above act came into operation. The question was, whether it was necessary to have an affidavit proving the handwriting of the commissioner of affidavits. Upon the point being mentioned to Sir R. T. Kindersley, V. C., his Honor thought that the section had no retrospective effect; and it was intimated to his Honor that Sir G. J. Turner, V. C., had similarly decided.

TURNER, L. J., said that in the case alluded to, there had been no authority to take the affidavit, but that in the present case there was authority to take the affidavit before the passing of the act.

THE COURT were of opinion, that whether the affidavits were taken before or after the act came into operation, it was within the 22d section, and that evidence of the handwriting was unnecessary.

¹ 17 Jur. 170.

*Ex parte Copeland; In re Copeland.**Ex parte COPELAND; in re COPELAND, a Bankrupt.*¹

November 8, 1852.

Railway Shares — Whether within the 201st Section of the Bankrupt Law Consolidation Act.

In estimating the loss upon a contract for the purchase or sale of government or other stock, with reference to the question whether a bankrupt, by such contract, has been brought within the penal provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, the broker's commission must be included, and the gross amount of the loss arising from the variation in the price of the stock, added to the commission taken as the measure of the loss. Therefore, where a bankrupt had, within a year of the date of his petition for adjudication, lost, upon a contract for the purchase of railway stock, a sum, exclusive of the broker's commission, slightly less than 200*l.*, but which, when added to the broker's commission upon the purchase, made up a sum slightly exceeding 200*l.*, the bankrupt was held liable to the penalty.

The word "contract" used in the section of the statute includes "contracts;" and therefore the bankrupt is liable to the penalty of the statute where he has lost within the period mentioned therein, 200*l.*, arising from the aggregate of losses upon several contracts.

Semble, railway shares, as distinguished from railway stock, are within the 201st section of the Bankrupt Law Consolidation Act, 1849, which provides that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any contract for the purchase or sale of any government or other stock.

And *semble*, per Lord GRANWORTH, L. J., that a contract for the purchase of railway stock, not performed by a transfer of the stock within one week after the contract, but carried over from time to time by means of continuation contracts with the broker, is within the provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any sort of gaming or wagering.

THIS was an appeal from the decision of the commissioner, refusing to grant the petitioner a certificate of conformity, as having brought himself within the penal provision of the 201st section² of the Bankrupt Law Consolidation Act, 1849, by a loss of 200*l.*, within one year next preceding the filing of the petition for adjudication, upon

¹ 17 Jur. 121.

² "That no bankrupt shall be entitled to a certificate of conformity under this act, and any such certificate, if allowed, shall be void, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*, or, within one year next preceding the issuing of the fiat or filing the petition for the adjudication of bankruptcy, 200*l.*; or if he shall, within one year next preceding the issuing of the fiat, or the filing of such petition, have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have parted with, concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made or been party or privy to the making of any false or fraudulent entry in any book of account or other documents, with intent to defraud his creditors, or shall have concealed any part of his property; or if any person, having proved a false debt under the bankruptcy, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge."

Ex parte Copeland; In re Copeland.

a contract for the purchase of railway stock, called "Manchester, Sheffield, and Lincolnshire Stock," and which contract was not to be performed within one week after the date thereof. It appeared that on the 27th February, 1851, the bankrupt contracted for the purchase of sixty shares in the Manchester, Sheffield, and Lincolnshire Railway Company. The purchase was accordingly effected on that day, the subject-matter being described in the broker's bought and sold note as sixty shares in the Manchester, Sheffield, and Lincolnshire Railway Company, upon which 100*l.* had been paid up; but in the books of account of the broker the subject-matter of the contract was designated as so much stock of the railway company in question. At a half-yearly meeting of the shareholders of the company, held in February, 1850, a resolution had been passed to the effect, that, agreeably to the act of incorporation of the company and the provisions of the Companies Clauses Consolidation Act, such of the shares of the capital of the company as were paid up should be converted into capital stock of the company, to be denominated "consolidated stock." The contract thus entered into by the bankrupt was, on the 26th April, 1851, carried over by a continuation contract, by which the bankrupt paid a certain amount of commission, called *contango*, to the broker for the privilege of extending the time limited by the original contract for payment of his purchase-money. Ultimately, on the 24th May, the shares were sold by the bankrupt at a loss, including 7*l.* 10*s.* paid for commission of 390*l.* according to the estimate advanced by the assignees, or of 202*l.* 10*s.* according to that admitted by the bankrupt. The petition of adjudication was filed on the 27th March, 1852.

J. Russell and *Martindale*, in support of the appeal, contended, first, that the amount lost by the transaction, if commission were excluded, as they argued it ought to be, was under 200*l.*, and not sufficient, therefore, to bring the petitioner within the penalty of the statute; secondly, that the loss did not arise upon one contract, as, according to the terms of the statute, it ought, but was the aggregate of two losses, one arising under the original contract, and the other under the continuation contract, each of which, when taken separately, was insufficient to bring the case within the statute; thirdly, that if the contract was one, it was entered into more than twelve months before the bankruptcy, and was not, therefore, within the statute; and lastly, that the respondents, upon whom the onus of proof lay, had not shown that at the date of the contract the subject-matter thereof was, or was intended by the petitioner to be, railway stock, as distinguished from railway shares, and that, therefore, the subject-matter of the contract had not been shown to be "Government or other stock" within the meaning of the statute.

Bacon and *Selwyn* appeared for the respondents, the assignees, and contended that the commission paid to the broker was part of the loss occasioned by the contract, and arising to the estate thereon; that, by the interpretation clause of the statute, the singular word

Ex parte Copeland; In re Copeland.

"contract" was extended so as to include the plural "contracts," that the penalty of the statute was incurred by the bankrupt not by the contract, but by the loss arising thereon, and which was only complete at the date of the sale; and lastly, that after the resolution passed by the shareholders of the company, every share in the capital thereof upon which 100*l.* had been paid up must be presumed to be 100*l.* stock, and that the petitioner had not shown the contrary as to the subject-matter of the contract in question. They cited *Ex parte Matheson*, 1 De G., Mac. & G. 448; s. c. 13 Eng. Rep. 482.

Martindale replied.

LORD CRANWORTH, L. J. The first question is, whether, assuming for the present that the contract complained of was for the purchase of stock within the act, there has been a loss thereon within the year of 200*l.* and upwards. There is no doubt that there has been such a loss of 202*l.* 10*s.* upon the transaction, if as part of the loss is to be included the commission paid on the contract; and we are clearly of opinion that the commission must be included as part of the necessary costs of accomplishing the contract. If, in carrying the contract into execution, the necessary expense is added to the loss otherwise occasioned, the gross amount is the measure of the loss. That amount is, at least, 202*l.* 10*s.*, which but slightly exceeds the amount fixed by the act; but if it does exceed that amount by the smallest fraction, that is sufficient, not only to justify what the commissioner has done, but to make it his positive duty so to act. The next question is, whether the transaction amounts to a contract within the meaning of the statute. One objection made by the petitioner is, that the contract was not one, but that the loss was occasioned by different contracts, namely, an original contract, with a subsequent renewal thereof. I see nothing in that objection, for I think the word "contract" used in the statute includes "contracts." It would be absurd to impute such carelessness to the legislature as to leave the law open to be defeated by merely splitting the transaction. Upon that, however, it is unnecessary to speculate, for by the interpretation clause of the act it is provided, that words in the singular number are to include the plural; but even if there had been no such clause, it would be absurd to construe the language otherwise than to hold that it includes contracts. That being so, the next question is, whether this is "government or other stock" within the meaning of the section. It is perfectly clear that the subject-matter of the contract was stock, and not shares, if there be a distinction. True it is, that it is described in the broker's notes as shares upon which 100*l.* has been paid. That, however, is capable of easy explanation. The beneficial interest in this company, as in all others, while the affair is in progress, goes in the form of shares, on which calls are from time to time made, while there is only part of the capital paid up. When, however, the whole capital has been paid up, then it becomes unimportant that the beneficial interest should remain in the form of shares. It may be, and in most cases will be, convenient to the holder, and

Ex parte Copeland; In re Copeland.

to the company also, that it should be converted into stock, the difference being merely, that, when converted into stock, it becomes capable of easier subdivision than while in the form of shares. That being the usual course, we find that on a certain date in February, 1850, the shares having been all paid up—that is to say, with the exception of some which, by default, had not been paid up, but the full amount of calls having been made upon all—the resolution come to was, that the shares might be now converted into stock. I think the meaning of that necessarily is, that those which were then paid up should be instantaneously converted; and that as to the others, the shareholder, on paying up the remainder, might have his converted into stock. That being so, what is sold here is stock or shares, on which the whole 100*l.* has been paid up. It is indifferent, then, whether the purchase is of a share on which 100*l.* has been paid, or of 100*l.* stock. That is so immediately after the shares have been converted into stock, if not before. What this gentleman dealt in was obviously stock of the company. That is proved by this—that it never occurred to the parties to think of the difference between one state and the other. The broker in his account calls it stock. The only circumstance calculated to raise a doubt is, that in the bought and sold notes the subject-matter of the contract is described as shares upon which 100*l.* has been paid up. The reason of this, however, is, that these notes are prepared in the shape of a printed form, adopted in all railway companies, and adapted to all shares, whether fully paid up or not; therefore it is called a share upon which 100*l.* has been paid up, instead of 100*l.* stock. But it is abundantly clear that this gentleman understood that he was purchasing stock, and in truth there was nothing else but stock that he could purchase. The broker calls it stock, and it is stock no doubt. If that is so, this case is governed by that of *Ex parte Matheson*, where it was held, that railway stock was clearly “other stock,” within the meaning of the act of parliament. On the grounds, therefore, that “contract” in the act includes “contracts,” that the loss was of the amount and practically within the period mentioned in the act, and that the subject-matter of such contract was railway stock, it is clear the commissioner was right. I go merely upon that narrow ground; but, speaking for myself, I do not suppose that if this had been shares, as distinguished from stock, I should have decided otherwise than I have decided. It is difficult to see much distinction between the two sorts of misconduct, so as to take one out of the language of the act. Moreover, though it is unnecessary to rely upon it as a ground of my decision, I am strongly inclined to think that this transaction was a sort of gaming or wagering within the prior clause of the 201st section of the act.

KNIGHT BRUCE, L. J. Assuming merely the legal question upon the construction of sect. 201 to be with the bankrupt, and not imputing to him unfairness or absence of honesty, as those words are used and understood in private life, I still doubt very much, to say the least of it, whether the dealing and conduct of this gentleman have been of such a nature as possibly to authorize a certificate. So much in

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passing. I will take the question as it arises on the narrow and restrictive view of the construction of sect. 201. As to that, if there is a distinction, a substantial distinction, which ought for the present purpose to weigh between railway stock and railway shares, my opinion upon the evidence before the commissioner, and upon the additional matter which I have heard to-day, is, that the property in question, on which a loss has taken place within a year, was railway stock, as distinguishable from shares, and thought, intended, and known by the bankrupt to be so. Let me assume that, however, to be in the bankrupt's favor, and then I will say, that, on the merely legal question, still I am not satisfied that the bankrupt is free from the operation of sect. 201 of the statute. The words of the section are "Government or other stock;" but the act of parliament is one which is within, and forms part of, the same system with the 5 Geo. 2, c. 30, though that is now repealed. The language of sect. 12 of that act is—"shall within one year before the bankruptcy have lost the sum of 100*l*. by one or more contracts for the purchase, sale, refusal, or delivery of any part or parts, share or shares of any government or public funds or securities." Now, if there had been such a thing as railway stock, distinguishable as it now is distinguished from railway shares, I am not by any means satisfied that, had such act of Geo. 2 continued in force, railway shares would not have been stock within the meaning of that statute; and, upon a question of construction arising upon a subsequent statute on the same branch of the law, it is perfectly legitimate to use the former act, though repealed. It is not necessary, however, to decide that question, and therefore I reserve myself upon it, merely saying, that, according to the present inclination of my opinion, if the subject-matter of the contract had been shares, the bankrupt is still within the operation of sect. 201, properly construed in the manner applicable to all statutes, namely, the manner of suppressing the mischief and advancing the remedy. I am of opinion also, that, if there is a distinction between railway stock and railway shares, the matter here in question was railway stock, as distinguished from railway shares, and that it was so intended and known to be by the bankrupt. I am of opinion that the decision of the learned commissioner was plainly right.

SWEETING v. SWEETING.

January 20, 1853.

Legacy Duty — Condition — Purchase.

A testator devised lands to his son for life, with remainders over, and gave power to the son to charge these lands with an annuity for his wife, in bar of dower. The son charged the lands accordingly:—

Held, that such annuity was subject to legacy duty.

¹ 17 Jur. 128; 22 Law J. Rep. (N. S.) Chanc. 441; 1 Drewry, 331.

Sweeting v. Sweeting.

JOHN SWEETING, by his will, dated the 20th November, 1814, gave and devised his fee-simple estate of the manor of Kilve, in the county of Somerset, to trustees, on certain trusts, and, subject thereto, to the use of his eldest son, John Hankey Sweeting, for life, with remainder to the use of such child or children in such shares as the said John Hankey Sweeting should by deed or will appoint; and in default of such appointment, to them as tenants in common in tail, with remainder, in default of such issue, to the use of the second and other sons of the testator in the same manner, with remainders to his daughters, with an ultimate remainder to his own right heirs. The testator's will contained a power to his sons, when in possession of the said manor, to appoint, by deed, to or in trust for any woman or women whom he or they might marry, for her or their jointures respectively, and in bar of dower, any annual sum or yearly rent-charge not exceeding 400*l.* per annum. John Sweeting died shortly after, when his eldest son, John Hankey Sweeting, entered into possession; and having intermarried with his now widow, Amelia Augusta Sweeting, by a deed-poll, bearing date the 27th July, 1832, reciting the power given him by his father's will, he limited and appointed to the use of his wife and her assigns, for her jointure and in bar of her dower, two annuities, amounting together to the sum of 300*l.*, free and clear of all taxes and deductions whatsoever, and chargeable upon the fee-simple estate devised by his father's will. John Hankey Sweeting died in 1841, without having exercised his power of appointment in favor of his children, leaving his wife him surviving, who thereupon became entitled to her jointure, and several infant children, who became entitled to the estate as tenants in common. A suit having been instituted, a receiver was appointed, and the wife received the annuity, but no duty was paid on account of such annuity. A petition was now presented by the Attorney-General, on behalf of the commissioners of her Majesty's Inland Revenue, praying that the receiver might be directed to pay the sum of 425*l.* 17*s.*, the amount of duty alleged to be due, out of the rents and profits of the estate. The 36 Geo. 3, c. 32, s. 8, enacts, that duty on legacies, by way of annuity, is to be calculated according to certain tables, and paid by four yearly instalments. The 45 Geo. 3, c. 28, first granted duties on legacies payable out of real estate, and enacted that such duties should be accounted for by trustees of the estate, or, if there be no trustee, by the owner.

W. M. James, for the Attorney-General. The annuity in this case, being made in execution of a power to charge real estate given by will, is liable to the payment of legacy duty, under the 45 Geo. 3, c. 28, s. 4. *The Attorney-General v. Pickard*, 3 M. & W. 352; 6 M. & W. 648. It will be contended, on the other side, that this is a purchase, and not a legacy, being given in lieu and bar of dower. But the very late case of *The Attorney-General v. Henniker*, 21 Law J. Rep. (N. S.) Exch. 293, s. c. 14 Eng. Rep. 374, shows that a condition attached to such a gift cannot alter its character, and that it is still liable to the payment of legacy duty. In the same case, in error,

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16 Jur. 1143, s. c. 16 Eng. Rep. 475), the court, in delivering judgment, stated, that even if the condition had been annexed by the original will, it would have made no difference.

Follett, contra. First, this case is quite distinct from either of the cases cited on the other side. In the present case the power is qualified: there is a condition annexed to it which, in effect, renders it a purchase. It is expressly stipulated by the will that it should be in lieu and bar of dower — a condition which renders it a purchase on the part of the widow; and such a contract could never have been intended to be charged with the duty payable on legacies which are gifts strictly so called. In the cases cited the power might have been executed at any time and in any manner. There was no stipulation or condition annexed, and consequently no bargain contemplated. They cannot, then, be considered as governing this case, where such condition is made essential, and where the son is bound to enter into a contract with his wife in order to give her the benefit of the annuity.

[*KINDERSLEY*, V. C. Suppose it were the case of a legacy given on condition of barring the wife's dower?]

Such legacies are manifestly favored, as they do not abate. *Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morrett*, 2 Ves. sen. 420. Secondly, even supposing the cited cases applied to the present one, still they cannot and ought not to be considered binding on this court. They have been decided on a supposed rule of equity that the estates created by the execution of a power take effect precisely as if they had been executed by the instrument creating the power. Now, it is contended that there is no such general rule, or that there are many exceptions to it. For instance, a deed affecting an estate in a register county must be registered. *Scrafton v. Quincey*, 2 Ves. sen. 413. In the same way, a deed executing a power over real estate is deemed a conveyance within the 27 Eliz.; clearly showing, that for many purposes the two instruments are considered as quite distinct. So, Lord Hardwicke in the case of *Marlborough v. Lord Godolphin*, 2 Ves. sen. 61; when it was contended that acts done in virtue of an authority were the acts of the old proprietor, he overruled the point, and did not admit that where a person takes by virtue of a power, he takes from the time of the creation of that power.

Kinglake, on the same side. The annuity, if liable at all, is only liable to the lowest rate of duty. Here the power was given manifestly for the son's benefit, and therefore must be taken to be a gift to the son himself, and not one to a stranger. But it is clear that it ought not to be made liable at all. The court will regard it as if the testator was relieving his own liability in favor of his heir, by providing for the future liability to dower.

W. M. James, in reply. There is no material distinction between this case and the cases decided by the Court of Exchequer. The rule, that a person taking under the execution of a power takes under the original instrument, is too well established to be disputed. The

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exceptions referred to on the other side only prove the rule. This is merely a gift of an annuity on condition; there is nothing to indicate a purchase — no negotiation entered into. It is not suggested that the wife was dowable out of the estate; and it is now too late to allege that a legacy is the less a legacy because a condition is attached to it giving collateral advantages to another party. There is no doubt that a legatee of 10,000*l.*, on condition that he conveyed an estate to B., would have to pay legacy duty; neither can it be taken as a gift to the son, after the cases decided in the Court of Exchequer.

KINDERSLEY, V. C. The question in this case arises on stat. 45 Geo. 3, c. 28, s. 4, which makes a gift of money charged on land liable to the payment of legacy duty. In order to arrive at a correct decision on this point it is necessary, in the first place, to consider how the law stands with reference to the duty chargeable on gifts of personal estate; and I will suppose a gift to A. of 500*l.* on condition of his assuming the name and arms of the testator. In such a case the legacy would no doubt be liable to the payment of the duty. We will even go further than that, and suppose a gift to A. on condition that he convey an estate to B.; and in that case also there can be no doubt that the duty would attach to the legacy. I will further suppose that the testator, having a daughter, a widow, with children, bequeathed to her an annuity, payable out of his personal estate, on condition that she maintained and educated her children. In this case the maintenance and education of her children would doubtless be a considerable burden, but still the daughter must perform the condition in order to entitle herself to the annuity; and in such a case the legacy duty would be payable.

A question may arise as to the amount upon which legacy duty would be payable, as in the case of a gift of 500*l.* to A. on condition that he paid 100*l.* to the testator's executors; it may be that in such a case the legacy duty would only be payable on the difference. That, however, is not the question here, and it is unnecessary to say more on it. But where there is a general legacy given by will to A., even although it be coupled with such a condition as makes it amount to a purchase, still it would be liable to the duty. In fact, I do not, for my own part, see where the line can be drawn, in case you establish the principle that a legacy may in certain cases, when coupled with a condition, become a purchase. I do not, I say, see where you can draw the line between a mere condition and a purchase. In my opinion, a legacy to A. on condition is always indicative of this intention on the part of the testator: — "I wish such an act to be done; it is at his own option to do it or not; and if he does it he shall have the benefit." So far it is a purchase, but not, in my opinion, the less a legacy. Such being the estate of the law with reference to legacies out of the personal state of the testator, let us now see the words of the act of parliament on which the present question arises; and here we find that the word "gift" is used in the same manner as it is where the duty is charged on legacies out of the personality; and consequently we must apply the same meaning to a

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gift of money charged on the real estate as to one charged on the personalty; and, I apprehend, not the less so because a condition is attached to the gift. Now, if there were a gift of a sum of money to the wife of the testator's son, in consideration of the release of her dower, such a legacy would unquestionably be liable to duty; and if the money were charged on the real estate, it would clearly be still liable. But let us go further, and suppose a gift to such one of A.'s children as A. shall appoint. If A. exercises the power, the child takes immediately under the will creating the power, according to the general rule, that where a party takes any thing under the execution of a power, he comes in under the instrument creating that power; and notwithstanding that there were a condition attached to such power as that the son should do a certain act, that, in my opinion, would not vary the case. Now, the question before us is just the same in principle as that which I have just instanced. Here we have a power given to the son to appoint, by deed or will, to any after-taken wife for life, an annuity or rent-charge for jointure, and in bar of dower, not exceeding 400*l.* a year, the same to be chargeable on the testator's lands. Suppose that it were done by will, on condition that the wife released her dower, I cannot see how a condition to be performed in favor of the party executing the power can have any effect on the nature of the charge, which only takes effect under the original instrument. But, in point of fact, it makes no difference whether the power be executed by deed or will. Once you establish the principle which governs the execution of powers, it is quite immaterial what the instrument executing the power is.

Two cases have been cited on the part of the crown in the course of the argument. *The Attorney-General v. Pickard* and *The Attorney-General v. Henniker*; and I confess that I do not see how, since the decision in those cases, there can be any doubt that legacy duty is payable in the present instance. A distinction has been attempted to be drawn between those cases and the present, that there the power was given of making a gift generally, but that here it is confined to the making a gift to the wife of the donee in bar of dower. But I cannot allow that there is any force in the argument, or that the distinction is one which makes any difference in the construction. The gift is still a gift to a stranger in blood to the testator, clogged, indeed, with a condition, but not on that account changed in its character or its incidents. In *The Attorney-General v. Henniker* the court expressed a doubt whether, if the condition had been annexed to the gift by the testator himself, legacy duty would be payable on the whole gift, or merely on the difference in value between the legacy and the estate given in consideration for it. In that doubt I cannot concur. I think, that even although, as in the present instance, the condition is one which has been annexed by the person creating the power, yet that legacy duty is payable on the whole amount of the sum given. It might, indeed, be different if the condition were to pay a sum into the corpus of the testator's estate; but, as I stated before, it is unnecessary to decide that question here. In accordance, therefore, with the cases decided in the Court of Exchequer, which in

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my opinion carry into effect the intention of the legislature, and are in accordance with the recognized principles of the law, I must order that the stamp-duty be payable on the annuity charged in favor of Mrs. Sweeting. It has been contended, that inasmuch as the testator gave his son this power of charging for his, the son's, own benefit, and therefore did it merely with a view of conferring an advantage on his son, the gift is only liable to the same amount of duty as if it had been a gift immediately to the son. But I cannot, even conceding that the wife were dowable out of the lands in question, see how it can be regarded in any other light than as a gift to a stranger in blood to the testator. It must, therefore, be considered liable to the full amount of duty payable in such cases.

HEXTALL v. CHEATLE.¹

December 15, 1852.

15 & 16 Vict. cc. 80, 86 — *Cross-examination of Plaintiff before an Examiner of the Court, instead of in the Master's Office.*

THE object of this suit was, in effect, to charge the defendant with the occupation of a farm, and for an account of the rents and profits. A decree had been made, which was being prosecuted before the Master in June last, when it was agreed that the plaintiff should make an affidavit of the quantity and value of the stock, &c., upon the farm, as a witness to charge the defendant, and that he should be subject to cross-examination on the part of the defendant. On the 22d July, the plaintiff accordingly took in his affidavit, and it was arranged that he should be cross-examined *vivâ voce*; but as the Master required the assistance of a short-hand writer, and it could not be agreed who should bear the expense of this mode of taking the evidence, the Master directed that the plaintiff should be examined upon interrogatories. The matter then stood over until Michaelmas term, and the stats. 15 & 16 Vict. cc. 80, 86, having passed meanwhile, the Master thought, that, upon the effect of those statutes interrogatories could no longer be exhibited before him, and suggested that the plaintiff should be examined *vivâ voce* before the examiner. This the plaintiff refused to accede to, and the matter was again ordered to stand over. Thereupon the present motion was made by the defendant, that he might be at liberty to cross-examine the plaintiff *vivâ voce* before the Master, or before one of the examiners, in the mode prescribed by the stat. 15 & 16 Vict. c. 86, and the orders of the court; and that, if necessary, the plaintiff might be ordered to

¹ 17 Jur. 128.

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attend before the said Master or before one of the examiners for that purpose, or that the defendant might be at liberty to exhibit interrogatories for the cross-examination of the plaintiff before the Master; and that it might be ordered, either by altering the decree made in the cause, or in such other manner as the court should think fit, that the parties to the last mentioned cause were to be examined upon interrogatories, as the Master should direct.

Wigram, Q. C., and *Hitchcock*, for the motion, referred to stat. 15 & 16 Vict. c. 86, ss. 28, 35, 40, 41, and stat. 15 & 16 Vict. c. 80, s. 39; and *Pinhorn v. Sonster*, 16 Jur. 1001; 14 Eng. Rep. 415.

Bacon, Q. C., and *W. M. Jones*, contra, said that the plaintiff was not unwilling to be examined *viva voce* before the examiner.

STUART, V. C., made an order that the defendant might be at liberty to cross-examine the plaintiff *viva voce* before one of the examiners of the court, and that the plaintiff should attend for that purpose, as sought by the motion; and a supplemental order, that the parties to the cause were to be examined upon interrogatories, as the Master should direct.

 BERNASCONI v. ATKINSON.¹

January 14 and 18, 1853.

Will — Construction — Uncertainty of Description.

Gift to "V. B., the son of my uncle, P. B." There was no such person as V. B., but there was a G. V. B., commonly called by the testator V. B. But G. V. B. was not the son of P. B., but of another uncle of the testator. P. B. had two sons, neither of whom was called V. One of such sons had been many years abroad, and the other was hardly at all known to the testator. G. V. B. was on intimate terms with the testator:—

Held, that G. V. B. was entitled.

The court will not adopt an intestacy for uncertainty except in the very last resort.

Extrinsic evidence is only admitted to assist in the construction of wills where the ambiguity is created by matter *dehors* the will.

A testator will always be held to have used the very description in his will, notwithstanding it may, in fact, be the description rather of his legal adviser than his own.

THE bill in this case was filed by George Vincent Bernasconi against the trustees, Atkinson and two others, Frederick Barnasconi, and the widow of the testator, under the following circumstances:— The late Bartholomew Barnasconi, by his will, dated the 14th April, 1852, gave all the residue of his real and personal estate to the three first-named defendants, as trustees, upon trust to sell, get in, and convert into money the whole residue, and pay debts and legacies; and

¹ 17 Jur. 128.

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then he gave several legacies — among others, a legacy to “my first cousin, Ann, the daughter of my late uncle, Peter Bernasconi;” and the testator directed the clear residue of the proceeds to be paid, transferred, and assigned to “my sister, Jane Ann Blackwell, and my first cousin, Vincent Bernasconi, son of my said late uncle, Peter Bernasconi,” as tenants in common. The testator died on the 5th May, 1852. The executors proved the will, and got in the estate, and paid the debts and legacies. It appeared that there was no person exactly answering the description of the testator’s “first cousin, Vincent Bernasconi, son of the testator’s late uncle, Peter Bernasconi.” The plaintiff, George Vincent Bernasconi, was the son of the testator’s late uncle, Joseph Vincent Bernasconi, who was commonly called Joseph Bernasconi. The plaintiff was therefore the first cousin of the testator, and was generally called Vincent Bernasconi. The testator had had six uncles. Four of them died without issue. The remaining two were the said Joseph Vincent Bernasconi, who predeceased the testator, leaving the plaintiff his only surviving son, and Peter Alexander, who also predeceased the testator, and who had had two sons — Alexander Bernasconi, who had gone abroad, and had not been heard of for eleven years, and Frederick Bernasconi, the defendant, who claimed in opposition to the plaintiff. The defendant Frederick was not in the habit of visiting the testator. The plaintiff was on visiting terms, and was the only first cousin of the testator who was on terms of intimacy with the testator; and there was abundance of parol evidence, extra the will, such as statements by the testator to his solicitor, to show that, in fact, the plaintiff was the person intended to take. The defendant, Jane Ann Blackwell, was the testator’s heir-at-law and sole next of kin, according to the Statute of Distributions. She and her husband, the defendant, Thomas Blackwell, claimed on the ground of uncertainty in the description of the nephew who should take.

January 14. The case now came on, on motion by the plaintiff for a decree or decretal orders under the new act.

Rolt and Chapman Barber, for the motion.

Tripp, for the defendant, Frederick Bernasconi.

Bacon and Freeling, for the defendants, Thomas Blackwell and Jane Ann, his wife, claiming under uncertainty.

Dauney, for the widow.

The arguments used, and cases cited, are sufficiently stated in the judgment.

January 18. *Wood, V. C.* The question in this case is, whether there is to be an intestacy declared, from the impossibility of determining what the testator’s intention was who should take. Now, an intestacy is the very last resort which the court will be driven to

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adopt. I was anxious, when the cause stood over, to see how far parol testimony could be admitted, for nothing can be of more importance than to adhere to the rules of the Statute of Frauds. It appears to be quite plain that there is only one case in which parol evidence can be admitted to explain or aid in the construction of a will, and that is where the description in the will is applicable to two different subject-matters of devise, or two different objects of the testator's bounty; in other words, where the ambiguity is caused by extrinsic evidence, and the words of the will stand well on the will itself. [His Honor referred to Sir J. Wigram's Treatise on Extrinsic Evidence applicable to Wills, and proceeded:] There is another thing to be remembered — that, in deciding cases of this description, we are bound to assume that the language of the will is the language of the testator himself; because here the solicitor who drew the will has said in his affidavit that the language was his, rather than that of the testator. Such statements must be disregarded. In all cases the words are rather the expressions of the adviser than of the testator himself, but the testator must be taken to have read over and adopted the expressions used. The words of a devise also must be construed according to their natural sense, if that be possible. If the extrinsic circumstances do not raise a case of this description, that the words are equally applicable to two subjects, then you cannot twist the sense of the words in the will itself to show that they may or might point to two or more subjects. There are cases of another class, where the words of the will are not applicable to any person or subject-matter, but there may be some person or thing to which, from the testator's habits, &c., it may be shown that he meant to refer; and the court is bound to look at all the circumstances surrounding the testator to see what his intention was. In the present case we not only have a description in the will applicable only to one individual, but assuming that the person in Russia may be taken to have been wholly out of the intention of the testator, then we have to consider whether, there being two persons — one fitting one part of the description, and the other fitting the other part — we can safely say that the testator intended one of these two individuals, and not the other. The cases have been very strong — so strong that judges have said that, were it *res integra*, they would be careful how they proceeded further. [His Honor then referred at some length to the cases of *Doe d. Hiscock v. Hiscock*, 5 M. & W. 363, and the cases there cited, and *Camoy's v. Blundell*, 1 H. L. C. 778; see p. 792, Lord Brougham's observations.] Now, here I think there is enough to enable the court to arrive at a conclusion. Sometimes the name is represented as prevailing over the description, and at other times the description over the name. In fact, the name itself is nothing but a part of the description. The question for decision in these cases is, whether the testator is more likely to have made a mistake in the name, or in the adjunct to the name of the donee or subject of the gift. [His Honor then briefly mentioned the cases of *Doe v. Huthwaite*, 3 B. & Al. 632; *Adams v. Jones*, 16 Jur. 159; s. c. 9 Eng. Rep. 269; and *Bradshaw v. Bradshaw*, 2 Y. & C. 72.] I have therefore to determine

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whether there is in this will, and in the circumstances surrounding the testator at the time of making it, sufficient to satisfy me that the testator meant Vincent, or Frederick, who was the son of Peter. So far it may be argued in favor of the defendant, that in almost all the decided cases the description, as it is called, has prevailed over the name. This was the case in *Adams v. Jones*; but there the testator took notice of the legatee being a married woman, the other claimant being an infant of tender years, which was well known to the testator. The description there was held to indicate the individual better than the name alone. So, in *Doe v. Huthwaite*, there was the circumstance of the testator taking notice that the donee was a second son, showing that the testator's attention had been directed to that fact; and the testator had, in other instances in the same will, selected second sons as objects of his bounty. So, in *Camoy's v. Blundell*, there was the circumstance of the donee being described as the second son of a brother of Lady S. This was held to overbalance the mere inaccuracy of name. These cases, therefore, only show that where the testator specifies the object of his bounty in two ways, and we have to select one, we take that which seems in each case least obvious to error. Here there do not appear to be any of the circumstances which appeared in the cases I have alluded to: nothing to show that the testator's attention was directed to the fact of his intended donee being the son of any particular person; nothing to show any particular affection for his uncle Peter more than any other uncle; nor that the intended donee was selected as being the son of Peter more than any other uncle, but only as being his first cousin. When a testator makes a gift to a second son of some person, and you find that in other parts of his will he makes other gifts to second sons, that is a circumstance showing that it was in the mind of the testator that his donees were to be second sons. So, in *Adams v. Jones*, where the testator notices that his donee is a married woman. Here, it is true, the testator makes another gift to a daughter of Peter, and it is, therefore, urged that he had an intention to favor Peter's family — to treat these two donees as brother and sister. But even so, it comes to this — that the testator has made a mistake in the name; for Peter had no son called Vincent; and the question is, what mistake has he made? Has he made a mistake in the name, or in the parentage of the donee? Letters of the testator were put in evidence addressed by him to George Vincent Bernasconi, the plaintiff, by the name of Vincent; and it is shown that the plaintiff was well known to the testator by that name. The plaintiff was in the frequent habit of visiting at the house of the testator, which the defendant Frederick never did: in fact, the plaintiff was the only one of the testator's cousins who was in habits of intercourse with him. I do not admit the external facts beyond this — that the testator had two cousins, (excluding for the present the one in Russia:) the first he scarcely ever saw — the other he was in daily intercourse with. Then the donee is described, as to his parentage, so as to point to the first of these two; but as to the name, by the name of the latter. Can there be any doubt as to the conclusion to which a jury would be compelled

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to come? I have hitherto excluded the consideration that there was another son of Peter Bernasconi in Russia, whose name was not Vincent. I have assumed that he was not within the contemplation of the testator. If that be not assumed, it is clear that the preponderance is largely in favor of deciding for Vincent, as the only means of avoiding an intestacy. If we say some son of Peter must take, as it is altogether impossible (assuming that the testator could have had that other son of Peter in his mind) to say which son would take, there would clearly be an intestacy. There must, therefore, be a declaration that the plaintiff, George Vincent Bernasconi, is entitled under this bequest.

KELSON v. KELSON.¹

January 14, 17, and 24, 1853.

Consideration for a Settlement — Onus of Proof.

A post-nuptial settlement purported to have been made in consideration of natural love and affection, and for divers other good and valuable considerations:—

Held, that the onus of proving that some valuable consideration actually passed, lay on the party sustaining the deed.

THE bill in this case was filed by the infant children of Mr. Kelson, who would, under a postnuptial settlement made by their father, have been entitled to the interest of property comprised in that settlement, in default of appointment, or if he had exercised his power of appointment, then under that appointment. The consideration in the settlement was stated to be "natural love and affection, and divers other good and valuable considerations." The bill alleged a fraudulent appointment by the father, to one of his daughters, with a view to have a sum of money raised for his own use. The money was obtained accordingly, by a mortgage made immediately after the appointment, from a person of the name of Phipps. Phipps contended that the settlement was voluntary, and would be revocable on such a transaction, he claiming for valuable consideration; and that the only reason why the daughter was joined was in order to confirm and strengthen the transaction. It was contended on the other side, that the settlement might be upheld upon the words stating that it was made upon divers other "good and valuable considerations;" at all events, that it was to be taken as having been made upon good consideration until the contrary was shown. To this Phipps, the mortgagee, replied, that these words were merely a gratuitous addition by the person who framed the deed, and that it was necessary

¹ 17 Jur. 129.

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that the party relying upon them should show that there was some warrant for their insertion.

Rolt and Grove, for the plaintiffs.

Karslake, for the defendant, Phipps.

Webb, for a mortgagor, took no part in the discussion.

Wood, V. C., reserving the point upon whom the onus rested of proving or disproving that these words had any substantial meaning, requested to be furnished by the counsel on both sides with a list of the cases supposed to bear upon the point.

The following cases were, on a subsequent day, handed in to the secretary:—*Chapman v. Emery*, Cowp. 278; *Pott v. Todhunter*, 2 Coll. 76; s. c. 9 Jur. 589; *Douglas v. Waad*, Ch. Cas. 100; 2 Sugd. V. & P. 938, 11th ed.; *Twine's case*, 3 Rep. 78, 81; *Peacock v. Monk*, 1 Ves. sen. 128; and *Clifford v. Turrill*, 12 Jur. 428.

January 24. Wood, V. C., (after stating the circumstances). The question, then, amounts to this, whether the statement in the deed that there were certain other "good and valuable considerations," not naming them, will, without more, support the settlement—at least, so far as to throw upon the parties impeaching the settlement the onus of showing that there was, in fact, no such good and valuable consideration as that here referred to. I have found a case which I think goes to decide that these words themselves will not amount to so much as to show that the settlement was not voluntary. That case is *Gully v. The Bishop of Exeter*, 2 Moo. & P. 266. It is not one of the cases to which I was referred by Mr. Karslake. The doubt in my mind was, how far I could hold that a settlement was voluntary which contained these words, "for good and valuable consideration." These very words occurred in the case to which I have referred. There it was sought to set aside a deed dated so long back as 1672, in which the consideration was stated to be 20s. and good services rendered, "and for divers other good and valuable considerations." The learned judge who tried the case at *Nisi Prius* left it to the jury to say whether 20s., so long ago as in the year 1672, and the services stated to have been rendered to the grantor, did not amount to more than a nominal consideration in themselves, and the jury found that they did, having regard to the difference in the value of money and the state of society; that they could not say 20s. was not at the time of the deed a valuable consideration. Then, when the case was brought before the Common Pleas to have a new trial, on the ground of misdirection, Best, C. J., said, that the words, "divers other good and valuable considerations," might be treated as mere ornament. I have very little doubt, that if a *prima facie* case were raised by these words, the onus would be on the defendant to upset it; but this case seems to show that there is no such *prima facie* case raised by these words. I admit that the expression of the Chief

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Justice is not what is called a judicial dictum; but it is to be observed that the whole argument went on the fact that 20s. might, at the time of the execution of the deed — 150 years before the trial — have been a substantial consideration, and on the services stated to have been rendered, which would not have been necessary had the other general statement of good and valuable consideration been sufficient. I think, however, that the plaintiffs ought to have an opportunity of showing, if they can, that there was a good and valuable consideration. The course I shall take will be the same as that taken in *Folder v. Stewart*, at the Rolls in May last, (not reported). I shall therefore direct an inquiry whether the settlement was founded on any and what valuable consideration, and adjourn the case to chambers to prosecute this inquiry. I do not forget the circumstances under which the plaintiffs ask for this inquiry.

MYERS v. PERIGAL.¹

November 15, 1851, and December 1, 1852.

Mortmain Act — Joint-stock Bank — Holding Real Estate as an Investment.

By a deed establishing a joint-stock bank it was declared, amongst other things, that the directors should accumulate unemployed capital, and that for that purpose they might invest the same on mortgage or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments in Great Britain, and might from time to time sell the same, and re-invest in like manner. And it was declared by the deed "that all the property of the company, as between the shareholders thereof, and as between the respective real and personal representatives, should always be considered and deemed to be personal estate." M., a shareholder, by his will, bequeathed his shares in the bank to trustees, to pay the dividends to his wife for life, and after her death, to sell, and invest the proceeds in government securities, for certain charities. M. died, and at the time of his death, the property of the bank consisted of, amongst other things, freehold and copyhold hereditaments, and money due on mortgage of freehold, copyhold, or leasehold hereditaments: —

Held, by Lord ST. LEONARDS, C, reversing the decision below, and following the opinion of the Court of Common Pleas, that the bequest to the charities was a good bequest, and not affected by the Statute of Mortmain.

Per Lord TRURO, C. Distinction between joint-stock companies established by deed, and those established by act of parliament.

Effect of a declaration that the partnership assets are to be considered personal estate.

THIS was an appeal from the decision of the late Vice-Chancellor of England, (reported 16 Sim. 533; 13 Jur. 283), where he held, affirming the finding of the Master, that certain shares of the North-umberland and Durham District Bank (devised by the will of Timothy Myers to certain charities) were chattels real, or savoring of the realty, and therefore within the Statute of Mortmain, 9 Geo. 2, c. 36.

¹ 17 Jur. 145; 22 Law J. Rep. (N. S.) Chanc. 431.

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The facts fully appear upon the special case. The appeal was argued before Lord Truro, C.; and in Michaelmas term, November 15, 1851, his Lordship, when sending the case to the Court of Common Pleas for its opinion, made the following observations:—

LORD CHANCELLOR (Lord Truro). I have considered this case of *Myers v. Perigal*, and am prepared to give my judgment upon it; but it strikes me that these railway and joint stock cases should be put in some course of final decision. The property has now become so large and so extensive, and it is a question so likely frequently to arise, and has already so often arisen, and led to conflicting decisions, that it appears to me extremely important to put it in a course of decision. The cases seem to divide themselves into three classes. There is first of all the case of corporations simply—those companies possessing land, which are corporations, but corporations of the peculiar nature that each individual is entitled to a certain proportionate part of the profits only, resulting from the corporate property. That forms one class—corporations, therefore, of a peculiar nature. And with regard to those, there have been decisions that the shares in the corporate property under such joint-stock companies are not within the Mortmain Act. There are two or three cases I can mention presently, if necessary—one which related to the Chelsea Waterworks, where it was held that the Chelsea Waterworks were not to be considered as an interest in land within the Mortmain Act, because it appeared, that by the charter of incorporation, or the act of parliament, (whichever it was,) it was declared, in the first place, that the interest was to be personal property; but, in the next place, the Court of Exchequer decided that the interest of a corporation was an interest in the profits, and not an interest in the land, and therefore did not come within the Mortmain Act. There had been other cases in which the question had also been considered; but I shall merely make a passing remark on those, that it does not appear that the peculiarity which belonged to corporations of the nature that we are now considering, was very particularly considered. There is certainly a distinction between corporations of this description and general corporations, in this respect—that, generally speaking, the member of a corporation has no specific share or interest in the profits of the corporate property, and, generally speaking, the corporator cannot assign his interest in the corporate property, but in corporations of this description each corporator has a separate and distinct interest to the extent of his shares or proportions, which is capable of being assigned. However, the question as to the interest of a corporator is quite distinct from the interest which comes under consideration in this case. The decisions, however, form one class.

A second class is a joint-stock company established by act of parliament, as distinguished from a joint-stock company not incorporated; and the only distinction between joint-stock companies established by act of parliament, where the agreement of contract of partnership takes the form of law under the authority of the legislature, and joint-stock companies established by deed, where the joint-stock company

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is not incorporated, that I am aware of, is, that the specific enactments of the constitution, in the case of the act of parliament, become law, and will produce the effect specified; when the same, being merely embodied in the deed of partnership, might not have the same effect. I particularly refer to those acts of parliament which establish joint-stock companies, and which contain a clause that the interest of the shareholders shall be deemed personal estate. When the clause is embodied in an act of parliament, of course it has a legal effect; but when the same clause is contained in a deed of partnership, it has no effect at all, because parties cannot agree among themselves to alter the legal character, or the nature of the legal incidents attached to a certain description of property. There is, therefore, no distinction between joint-stock companies established by act of parliament and joint-stock companies established by deed, except as I before stated — that whatever enactments are contained in the act, they are legally binding, whatever may be their effect; but the same agreements embodied in a deed, if they are intended to have the effect of altering the incidents of law attaching to the nature of the property, will have no effect. But this is not one of those cases; therefore we need not consider what is the effect of a joint-stock company established by act of parliament. This is the case of a joint-stock company established by deed — not otherwise connected with statute law, except the general act for regulating general banking companies, which raises considerations quite irrelevant to those that apply to the present case. Those are the three classes.

The present case arises in respect of joint-stock companies established by deed. Now, as I have observed in the decisions, the peculiar nature of this property has been remarked upon, and has had some share in influencing the conclusion that has been come to; but I have been unable to discover what those peculiar incidents are which have any bearing on the question. Is there any difference in the law in a partnership between 100, or 500, or 1000, and a partnership of two or three? I am not aware that the law varies according to the number of members in the partnership. What, therefore, is the difference between a joint-stock company established by deed and an ordinary partnership? Why is it not an ordinary partnership? There may be some difficulties arising out of the increased number; but what are the legal characteristics of a partnership of a great number, different from what attach to those of a few, I am not aware. It is also said that the legislature, at the time of passing the Mortmain Act, 9 Geo. 2, could not have contemplated this description of property. Why not? I do not mean why not in the sense that the legislature at that time contemplated these large partnerships. But partnerships were understood, and if there had been any thing in the nature of partnerships that ought to have had any influence, I think it would have been noticed. If I am correct in my impression, it is an ordinary partnership simply in all its legal incidents, though attended with some difficulties of arrangement arising from the number. Then it appears to me that there is nothing in the nature of the partnership from which you are to suppose that the act of parlia-

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ment has no application to it. I would further remark, that, generally speaking, you consider that those decisions which are the most proximate to the period when the act of parliament passes, are most likely to correspond with the spirit and intention of the act. I refer to that, for this reason — that within five or six or seven years after the passing of the act there is a very important case of *Attorney-General v. Weymouth*, Amb. 20, where a testator had directed his estates to be sold, and out of the proceeds of the estates certain sums of money to be given to charities.

A question arose whether that was within the Mortmain Act. I think the judgment of the Lord Chancellor is important, because it takes a view of some of the points which have been made subsequently. He there remarks that the title of the act had been relied upon. The Lord Chancellor says: "It is insisted that the true intention of the act was, according to its title, to restrain the disposition of lands whereby they become inalienable, and this was the only intention of the act. But I think the intent of the act is taken up much too short, for the title is no part of the act, and has often been determined not to be so; nor ought it to be taken into consideration in the construction of this act, for originally there were no titles to the acts, but only a petition, and the king's answer; and the judges thereupon drew up the act in form, and then added the title; and the title does not pass the same form as the rest of the act; only the speaker, after the act is passed, mentions the title, and puts the question upon it; therefore the meaning of this act is not to be inferred from the title, but we must consider the act itself. It first takes notice that gifts and alienations of land in mortmain are prohibited by divers wholesome laws, as prejudicial to the common utility; and then it proceeds, that, nevertheless, this public mischief has greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable, to take place after their deaths, to the disinherison of their lawful heirs. The reason of this statute was to hinder gifts, by dying persons, out of a pretended or mistaken notion of religion, as thinking it might be for the benefit of their souls to give their lands to charities which they paid no regard to in their lifetime; and therefore the act of parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed executed a year before the death of the grantor, and enrolled within six months after execution, though this will render them equally inalienable; but the legislature blended the two inconveniences together — the acts of languishing and dying persons, and the disinherison of heirs."

I will just remark here, that it will be found, by referring to *Magna Charta*, c. 36, and the stat. 7 Edw. 1, that there has been a constant conflict between the legislature and the clergy and religious laity — the one trying to prevent alienation, under the influence of the impressions that are more strong when a man is about to leave the world than they have been during his life, and the legislature trying to prevent the disinherison of heirs under such circumstances, and constant attempts by the clergy and laity to evade the act. I refer to

that for this reason, that it may account for the generality of the words in the 9 Geo. 2, which, by the preamble, it appears were framed expressly to prevent evasion.

Now, it will oftentimes happen, from the imperfection of language, that you cannot adapt language to repress a general evil effectually without the language sometimes embracing cases beyond which the evil exists. But, as in many cases of the excise and customs, (for there are a great many regulations to prevent fraud in the excise and customs,) acts which are prohibited may oftentimes be done quite innocently; and whoever has had much practice in the Court of Exchequer will know, that with respect to having certain things on certain premises, where people carry on trades in which those articles may operate prejudicially to the public, there are a vast number of regulations made that oftentimes fix persons with penalties who have not obeyed the act, but whose disobedience is unconnected with a fraudulent object. But, as Lord Tenterden has said, these are general regulations to secure a great object, which could not be secured without them, and justifying their object, and they must be generally obeyed. So it will happen that to effect an object the legislature uses language very large and very extensive, with a view to secure that object which is deemed to be important, though in doing so you may affect cases not precisely within the object. The first duty is to look at the language of the act, to see its plain meaning, and if you find a case to come distinctly within the meaning of the language of the act, though the particular case may not come within the object, yet, as the legislature intended that full effect should be given to that which the language imports, you may sometimes be compelled to give it an effect with regard to objects not within the full intention. In the case I have just referred to, the Lord Chancellor remarks upon some of the arguments which have been used in modern cases with regard to the title and preamble of the act.

It appears that originally, by Magna Charta, and by the earlier statutes, and as commented on by Lord Coke, in 2 Inst. 67, those acts point at only some of the reasons which are to be inferred from the 9 Geo. 2, and point at others which have ceased to be of importance; such as, in Magna Charta, it points that gifts in mortmain have the effect of depriving the lords and depriving the crown of certain escheats, and so on, which were of importance as well to the lords as to the crown, for the public service. The 9 Geo. 2, points to those evils — the disinherison of heirs — but does not, of course, take notice of those other points, which have ceased when the alteration has taken place in the nature of property. The 9 Geo. 2, therefore, points to the disinherison of heirs the same as the old law, but it also adds that which might be within the intention originally, as well as within the later act, namely, the circumstance of advantage being taken of that state of mind of a person less capable of resisting influence when on the death-bed, than at other times. It therefore seems — and I refer to it merely to call attention to the fact — that those arguments which in modern times have been considered as of some importance, connected with the title of the act, and preamble of the act, have been

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considered in early times, and that the strength given to them latterly has not been ascribed to them on former occasions. Now, I would further remark, as I before said, that, as to this partnership, it is to be considered whether there is in fact any difference between this partnership and an ordinary partnership. It appears that the banking company are to carry on their concerns, with a power of investing, according to the directions of the committee or directors, their capital in the purchase of land, and using it by advancing by way of mortgage, and in various other respects; and it further appears that the general body have the control of the whole concern, at meetings called in a particular manner. Now, the land and the mortgage, and other property of this description which the partnership possessed, appear to be subject at all times to the disposition of the general body of proprietors, and in the mean time it is subject to the disposition and control of what may be called the managing partners, or, in other words, the directors. It is extremely important, as it strikes me, in this case, before it can be determined, to consider what is the effect, first of all, in regard to the partnership, whether it is in any manner different from an ordinary partnership composed of a much less number of persons.

In the next place, what is the effect of the company having the complete control over this property. Suppose it should be determined that the produce of the land which the company possessed should form a distinct fund, and be divided among the proprietors, would that have made any difference from that which now prevails, namely, that the profit of the land is thrown into a fund formed partly of interest of land, interest of mortgages, banking profits, and so on?—would there be any difference? Suppose the profits of the land had been divided among the shareholders as a distinct head, would that have imported an interest, charge, or incumbrance on the land? From the very general words used in this act, I think it may be matter deserving of consideration; and it strikes me that this is a case which ought to be determined on general principles, and that we ought to have the opinion of a court of law on their construction. I say so for this reason, that from the time the act was passed, down to the present time, there have been, at intervals, several cases. I have a long head-roll of cases here which have arisen on the construction of this act of parliament. Various views have been taken of it. I find, in the case decided by Sir J. L. Knight Bruce, V. C., that some of them have been composed of shares in companies which were corporations, and of shares in companies which were not. They have been treated as standing on the same footing entirely. There is no distinction whatever, and the observations made are general, as applicable to all. In one of the cases, indeed in more than one, the distinction is not pointed out as to which of the companies are corporations and which are not. Under these circumstances, it strikes me that the interest of the parties would be best consulted by having the opinion of a court of law. The value of the shares amounts to a considerable sum; 560 belong to the testator—600 altogether; there are forty which are out of the question, and which were the separate property of the wife. I think it is extremely desirable that the opi-

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nion of a court of law should be taken upon it; at the same time, if the parties wish it, I am prepared to give my own judgment. But I think it more important that it should go to a court of law.

Wetherell, on behalf of the appellants, said that they were desirous of having a case for the opinion of a court of law.

The other parties were desirous that the question should be disposed of by the Lord Chancellor.

It was finally arranged that a case should be sent for the opinion of the Court of Common Pleas.

LORD CHANCELLOR, (Lord Truro.) I have made these observations with a view of calling the attention of the bar to some matters that have not been remarked upon in the argument. Attention should be paid to two cases, which I will mention; perhaps, being under a totally different head of law, they may not have attracted attention. One is a case of *Baxter v. Brown*, 7 Man. & G. 198. In that case a partnership of a considerable number of persons was formed for establishing a fulling mill; thirty-five of the partners claimed to vote for members of parliament for the county, in respect of their interest in the fulling mill. The partnership was established by deed, with a declaration that the partnership property should be personal estate. The question came on in the shape of an appeal from the decision of the revising barrister, who had held that the partners in this mill were entitled to vote, and the Court of Common Pleas affirmed that decision. It is well worth while to see what distinction can be established between that case and the present. Another case, which was cited at the bar, appears to me to be very relevant and important, where certain brewers possessed considerable property in the shape of houses, and one of the partners in the brewery left his share in the partnership to charitable uses. The question arose whether it was within the Mortmain Act. It was held to be so. It will be also important to consider what effect should be given to that case, as bearing on this question; and I am inclined to think, on the whole, that there are several matters relating to that question more likely to be considered hereafter than they have been heretofore. I have gone through all the cases, particularly the decisions of the Master of the Rolls and Sir J. L. Knight Bruce, V. C., inasmuch as those are the principal decisions in opposition to the previous series of decisions. I have attended to the reasoning on which those cases are founded; yet with great respect, I think it right that the opinion of a court of law should be taken.

A case was accordingly prepared, which stated as follows:—
“Timothy Myers, deceased, by his will, dated the 24th June, 1844, duly executed and attested, among other things, directed his executors to convert into money all the residue of his personal estate, except his shares in the Durham and Northumberland District Bank at Newcastle, and to invest the proceeds in government securities, and to pay the dividends arising therefrom, and the dividends arising from his said shares in the Durham and Northumberland District Bank,

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unto his wife, Ann Myers, for her life ; and from and after her decease to sell and convert into money his said bank shares, and invest the same in government securities, which, with the government securities thereinbefore directed to be purchased, he directed to stand in his name for ever, and the proceeds thereof to be from time to time received by the following societies, namely, the Society for Promoting Christian Knowledge ; the Society for Propagating the Gospel in Foreign Parts, the Church Missionary Society, and the Church Building Society. The testator died on the 14th February, 1845, leaving his said wife, (now his widow,) the plaintiff in this suit, him surviving. The testator was, at the time of making his will, and of his death, entitled to 560 shares in the Durham and Northumberland District Bank at Newcastle, in his will mentioned, which is a bank established and carried on in conformity with the provisions of the 7 Geo. 4, c. 46, and by and under a deed of settlement, dated the 1st July, 1826, whereby it is, amongst other things, provided that they, the said several parties thereto, all of whom were distinguished by the title of proprietors, and the several other persons who for the time being should become and be proprietors of shares in the capital of the said company, should constitute and form an association or public joint-stock banking copartnership, to be called " The Northumberland and Durham District Banking Company," to be managed and conducted under and subject to the several rules, regulations, provisions, and agreements thereafter contained ; and the said company should have continuance until the same should be dissolved under or in pursuance of the provisions in that behalf thereafter contained. That the original capital or joint-stock of the said company for carrying on the same should consist of the sum of 500,000*l.* sterling, and should be divided into 50,000 shares, of the amount of 10*l.* each share, but might be increased, under the power for that purpose thereafter contained, by additional shares, in such manner as thereafter expressed.

That the business of the company thereby established should be exclusively confined to such as was usually carried on under the term ' banking,' including the issuing of notes of hand or bank-notes ; lending money on cash or other accounts, or upon real, leasehold, or personal security, bills of exchange, promissory notes, or letters of credit ; advancing money on the deposit of title deeds, goods, wares, and merchandise ; discounting bills of exchange or promissory notes, payable at or after sight, after date, or on demand ; borrowing or taking up money on receipts, bills, promissory notes, or other obligations, including also purchases, investments, dealings, or sales in or upon the Government or public funds of Great Britain, Navy or Exchequer bills, India bonds, Bank or East India stock, shares of the stock of their own copartnership, or of the stock of the Bank of England, or annuities for one or more life or lives, or of any other description ; and also including all other business transactions usual in banking establishments, and consistent with the laws then or thereafter to be in force concerning joint-stock banking companies and banking copartnerships ; and the business of the company should be so conduct-

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ed as not to contravene any of the provisions of the said recited act provided always, that the funds of the said company should not in any instance be invested in the stocks, funds, or loans of any foreign country, or in the purchase of land or other real estate, except as thereafter mentioned, articles of merchandise, mining concerns, or other adventures. That no benefit of survivorship should arise or take place amongst the shareholders in the said copartnership bank; and all the property of the company, as between the shareholders thereof, and as between the respective real and personal representatives, should always be considered and deemed to be personal estate, so that each and every of the shareholders should, as between and among themselves, have a distinct and separate right to his shares in the capital or joint-stock of the said company, and the same should be vested in him to and for all intents and purposes, and subject to his disposition by deed or will, or, in cases of intestacy, be transmissible to his personal representatives as part of his personal estate, and distributed accordingly, but under and subject to such provisions in the deed of settlement as should for the time being affect such shares, and also to his proportion of profits and losses as next thereafter mentioned.

That each shareholder should be entitled to and interested in the profits, and be liable and subject to the losses of the company in proportion to his shares in the capital fund or joint-stock thereof. That previously to the meeting of the company to be held in the month of July, 1837, as thereafter provided, and previously to the meeting to be held in January in the next and every subsequent year during the continuance of the company, the directors should determine upon such dividend, out of the clear profits of the company, as they in their judgment should think fit. That the directors should, within twenty-one days next after every meeting at which any dividend should have been announced by them, or any bonus should have been determined, cause the same dividend and bonus respectively to be divided amongst and paid to the shareholders respectively, according and in proportion to the number of their respective shares, at such time and in such manner as the directors should think fit. That it should and might be lawful for the directors for the time being of the said company, and they were thereby authorized and empowered, to provide in Newcastle-upon-Tyne, and in such other towns and places as they might think fit, such houses, offices, or premises as they should from time to time deem requisite or expedient for carrying on and managing the business affairs and concerns of the company, upon such terms and stipulations, and in such manner, as they might deem advisable; and such directors might, for those purposes, with and out of the funds of the company, purchase, in fee simple, or for any other estate, or take a lease of, at a yearly or other rent or otherwise, any houses, buildings, or premises, or in the like manner purchase or take a lease of any land, and erect and build any houses or buildings thereon, and keep such houses and buildings in repair for the purposes aforesaid, and fit up, adapt, and furnish the same for the use and purposes of the company, and at the expense thereof; and the same lands, houses,

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and buildings, or any of them respectively, or any part thereof, should or might from time to time, and at all times afterwards, sell again, exchange, convey, assign, let, or otherwise dispose of or deal with for the benefit of the company; and that such lands, houses, and buildings so purchased as aforesaid should, for the purposes of the said deed, be deemed personal estate, and part of the capital of the company, and from time to time included in the valuation of capital, and should be vested in trustees for that purpose appointed on behalf of the company, upon such trust as would effectually secure the object and intention of the said deed in relation thereto.

That as to such of the funds and capital or property of the company for the time being in the hands of the said company as should not be employed, or appear necessary to be employed, in the ordinary business thereof, the directors for the time being should, so far as they conveniently could, accumulate the same at interest, and for that purpose might from time to time lay out and invest the same, either in the names of trustees for the time being of the said company, or of such other persons as they, the same directors, might appoint, in or upon the same or one of the parliamentary stocks or public funds of Great Britain, or in Navy or Exchequer bills, or in India bonds, or Bank or East India stock, or on mortgages, or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments in Great Britain, or in the purchase of stock in this company, or of annuities for one or more life or lives, or of any other description, as they might think proper; and any board of directors, when they should deem it expedient, might cause any of the funds or property so by this article authorized to be laid out and invested as aforesaid, to be disposed of, called in, or otherwise converted into money, and the money arising thereby to be again laid out and invested in and upon any of the stocks, funds, or securities as aforesaid, and so from time to time as occasion might require. That the general board of directors should also appoint two or more proper persons to be trustees of the said copartnership bank, in whose names, or in the name of some one of whom, all grants, conveyances, and assurances of property in favor or for the use of the said copartnership, and all instruments and assurances for the security or for the indemnity thereof, and for the directors, officers, property, capital stock, and effects thereof, should be made and taken.

That all securities, instruments, and purchases which, in pursuance of the said indenture, should be taken or made by or in the names of the said present or any future trustees, or any other persons, in trust for or on account of the company, and all moneys and other property, estates, and effects thereby secured or therein invested or accruing therefrom, should be under the control and subject to the order and disposition of the board of directors of the said copartnership bank for the time being; and every order or direction made in writing by the said board of directors, touching the disposition of and dealing with the same securities, investments, and purchases respectively, should be obligatory on, and observed by, the said trustees or trustee, and should be a justification to them and him, and their and his indemnity, in acting in obedience to such order or direction; and all

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such trustees should, when required by the said board of directors, sign, seal, and execute, and should be bound to sign, seal, and execute, at the expense of the company, such declaration of trust of the estates, securities, moneys and effects purchased, taken, holden, or possessed by or vested in them respectively on behalf of the company, as such board of directors, or their counsel, should from time to time devise or require. That if, in pursuance of any of the powers contained in the said indentures, the company thereby established should be dissolved, the said board of directors should, with all convenient speed, wind up, settle, and bring to a final rest and balance the accounts and affairs of the company; and for giving effect to such winding up and settlement, but for no other purpose, the company, and the powers of the directors, and the election of new directors to supply vacancies, should be held to be subsisting and continuing, any thing thereinbefore contained to the contrary notwithstanding; and such of the funds and property of the company as should not then consist of money, and so much of the capital and profits of the company as should remain after answering the claims and demands thereon, should be paid to and distributed amongst the shareholders existing at the time of the dissolution, and their respective executors, administrators, and assigns, in the proportions in which they should then be respectively entitled thereto. The property of the said bank consists, among other things, of certain freehold and copyhold hereditaments, and money due on mortgage of freehold, copyhold, or leasehold hereditaments."

The question for the opinion of the court was, whether the bequest of the testator's shares in the Durham and Northumberland District Bank, after the decease of his wife, was a legal bequest within stat. 9, Geo. 2, intituled "An Act to Restrain the Disposition of Lands, whereby the same become inalienable."

The case was argued before the Court of Common Pleas,¹ on the 4th and 6th May, 1852, and that court certified that they were of opinion that the said bequest was a legal bequest within the said statute.

December 1, 1852. The case now came on for further hearing, upon the certificate of the judges of the Court of Common Pleas.

Craig and Wetherell, for the four charitable societies, who were appellants. There are two questions upon this appeal: first, that which was sent for the opinion of the Court of Common Pleas, namely, whether the shares in this banking company could legally be given to charities; secondly, if they could not, whether the order of the Vice-Chancellor was proper in directing that certain calls which have been made in respect of them should be paid out of the general residuary personal estate, or whether these calls should be raised out of the shares themselves. It will not be necessary to discuss the

¹ *Coram* JERVIS, C. J., CRESSWELL, WILLIAMS, and TALFOURD, JJ.

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second question if your lordship should agree with the opinion of the Court of Common Pleas, which we submit was the right decision.

Elmsley and *Faber*, for the widow of the testator. We submit that these shares were within the Statute of Mortmain, and therefore undisposed of by the will. The Vice-Chancellor of England decided that they were within the statute; and Lord Truro would have affirmed that decision, but the appellants took the offer of a case, and the Court of Common Pleas decided that these shares were not within the statute. The true question is, whether these shares can be considered as being "an estate or interest in lands, tenements, or other hereditaments," within the meaning of the 3d section of the 9 Geo. 2, c. 36. We submit that no declaration whatever in the partnership deed could alter the nature of the testator's property, and that the utmost effect which the declaration, that the shares were to be deemed personal estate, could have, would be, that they were to be deemed personal estate for the purposes of the partnership. *Rez v. The Hull Dock Company*, 1 T. R. 219; *Flint v. Warren*, 14 Sim. 554; *Baxter v. Brown*, 7 Man. & G. 198. If, then, the declaration of the parties could not alter the nature of the property, further than should be necessary for the purposes of the partnership, can any general rule of this court have a greater effect? We submit that it cannot, and that as a devise of real estate directed to be sold, and the proceeds to be applied to a charity, completely fails, (*Page v. Leapingwell*, 18 Ves. 463,) so the bequest in the present case fails. Real property, which forms part of partnership property, is not considered personal property for the purposes of probate duty. *Custance v. Bradshaw*, 4 Hare, 315; s. c. 9 Jur. 486; *Matson v. Swift*, 8 Beav. 368; s. c. 9 Jur. 521. The other side say that this question is concluded by modern authorities. Is this so? There is no doubt that the earlier cases show an inclination to carry out the full intention of the statute. In *Negus v. Coulter*, Amb. 367, the right to lay down mooring chains in the Thames was held to be an interest in land, and within the statute. *Tomlinson v. Tomlinson*, 9 Beav. 459. The first of the modern cases that are said to have broken in upon the earlier rule is the case of *The Attorney-General v. Giles*, cited in *March v. The Attorney-General*, 5 Beav. 433; s. c. 6 Jur. 829, and reported in *Shelford on the Mortmain Act*, 987; but there the land was held by the India Company merely for trading purposes. That was the case of a corporation, which could never have land except for the convenience of trade; but in the present case the testator was, *qua* partner, as much an owner of the land as any other member of the partnership. In *March v. The Attorney-General*, it does not appear from the report that the assurance companies held any land except for the convenience of trade.

[LORD CHANCELLOR. They advanced their moneys upon mortgage.]

In *Sparling v. Parker*, 9 Beav. 450; s. c. 10 Jur. 448, the case of *Tomlinson v. Tomlinson*, was not cited.

[LORD CHANCELLOR. No; but the Master of the Rolls said in

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Walker v. Milne, 11 Beav. 518, that if it had been it would not have altered his opinion.]

Suppose the case of one of two surviving partners in a brewery devising all his stock in trade, consisting of, amongst other things, various public-houses, could it be said that this devise would not be within the Mortmain Act? [They also referred to *Hilton v. Giraud*, 1 De G. & S. 183; s. c. 9 Jur. 838, and *Ashton v. Lord Langdale*, 15 Jur. 868; s. c. 4 Eng. Rep. 80.]

Renshaw, for the next of kin. Can the charities hold these bank shares? Suppose they buy up all the other shares of the bank, might they not then elect to take the land in which the capital of the bank is invested? This proves that the shares are an interest in land, and therefore within the statute.

The following cases were also referred to: — *Howse v. Chapman*, 4 Ves. 542; *Knapp v. Williams*, Id. 430, note; *Finch v. Squire*, 10 Ves. 41; *The Attorney-General v. Meyrick*, 2 Ves. sen. 44; *Thompson v. Thompson*, 1 Col. 381; *Bligh v. Brent*, 2 Y. & C. 268; *Hilton v. Giraud*, 1 De G. & S. 183; *Curling v. Flight*, 2 Ph. 613; *Humble v. Mitchell*, 11 Ad. & El. 205; *Watson v. Milne*, 11 Beav. 507; and *Flint v. Warren*, 14 Sim. 554.

Teed, for the executors.

LORD CHANCELLOR, (Lord St. Leonards,) without hearing the reply. In this case there have been cases cited both ways, but I will not trouble the other side for an answer. There is no doubt that any thing which is dedicated to a charity, and which savors of realty, is within the act of parliament. The words are very express — “interest in real estate.” You cannot dedicate any estate or interest, or any charge or encumbrance on any estate. It has long been held that any thing which savors of realty is within the act. The case of *The Skerries Light-house* (*The Attorney-General v. Jones*, 14 Jur. 379) was a clear case. There the light-house was built upon the property of the person who maintained it, and the light was a service rendered for which payment is made, and that was clearly enough in the nature of an interest in land. In many of the cases there was an interest in land, an interest in an easement dedicated to the charity; and, beyond all doubt, that is a gift which falls directly within the terms of the act of parliament. Some of the cases have gone a considerable length; for instance, that of the security on poor-rates. The cases of security on tolls have been considered to have gone a considerable way, for they were mere loans and personal estate, and could hardly be considered as savoring much of realty. But in these particular cases — take the case of tolls — there is an actual assignment of the very tolls and of the turnpike-gates, for example, and there is real property which is vested in the trustees, under which trust the money has been raised; and therefore there is something more than a savoring of realty in those cases. Then, if we come to the cases in which, by construction, it may be said there is an inte-

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rest in real estate, such cases as that now before the court, there the difficulty arises. Now, it is impossible to deny that the current of modern authority has set against the old cases. There was an inclination to carry the provisions of the Mortmain Act, as it is improperly termed, beyond even the intention of the framers. Perhaps the inclination is now setting in a little stronger the other way; but my inclination would be neither one way nor the other, but to put as plain and sensible a construction as I can upon the terms of the act of parliament, so as to obey, as the court is bound to obey, the provisions of the act, but not to give it an enlarged construction. That is not the province of the court. The province of the court is to give it a construction which satisfies the framers of the act itself, and which meets the real intention of the legislature. Now, take this case, independent of the authorities — did or did not this act of parliament intend to strike at an interest of this nature? If we look at the intention of the man who buys the shares, the purchaser, we shall have no doubt that he no more intended to obtain an interest in real estate than he intended to buy part of the property for his own immediate use. That is perfectly clear, because his interest is simply an interest, in all respects, in personal estate, by the very constitution of the partnership itself, which might go and remain in him as personal estate, and would go to his executors as personal estate, and his real representative, be it recollected, never could take the slightest interest in any portion of the real estate which might be acquired by this partnership.

I am not at all impressed with the argument, that a case might arise in which a surviving partner in a very large concern might buy up the shares, and he might become possessed of the whole real property as it then existed. What then? If he did acquire it, it would be in a new right — that is, the partnership being at an end, and he himself in possession of the whole property, he would find himself an owner of real estate; and if it was impressed at that moment with the character of real estate, everybody in this court and at this bar knows that the owner might elect to take it as real estate, even as between his real and personal representatives. Now, this case has been argued very fully and very well, but the learned counsel have been under the necessity of admitting that property for the purpose of carrying on the partnership trade would not fall within the act of parliament. Why not? Is real estate more obnoxious to the principle than that which is to be the subject of investment, if ordered again to be resold, and so to be changed from realty into personalty, and from personalty into realty, just as often as it suited the purpose of accumulation? — that is, with a view to profit, not with a view to hold it; whereas the property purchased to carry on the trade must at least be coexistent with the carrying on of the trade. Take, for instance, the case of a dock company. Why, beyond all question, the dock itself is real estate — that is, the dock itself, the property which has been excavated and formed into a dock, is the solid earth, although it is covered with water, and that is real estate. That must remain while the partnership remains. Now, it is not denied that the

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offices, and the land belonging to the offices, would be property not falling within the act of parliament. Why that exception? There is but one reason for it — because the subject itself is an interest in trade, and in trade only, and these things are the necessary adjuncts or incidents to the carrying on of that trade. In that view, therefore, there is an exception.

Now, suppose, for example, this banking company had purchased a real estate under the provisions of this deed, which no doubt they were at liberty to do, but at liberty to do only for the purpose of *quasi* investment, not to purchase it as real estate and retain it as real estate, but to purchase it as they would a vessel, or any thing that was the subject of value, in order to sell it to advantage at a future period, as they are bound to sell it by the terms of the deed; if they did sell it, what were they to do with the money? Why, invest it in the funds. Therefore it is not property as real estate as regards any partner. The true way to try it would be this — let there be a real estate bought by the trustees, or the persons in whom the right was vested by this partnership deed, and let us see what the interests and rights of any partner would be in that real estate. Could he enter upon it, and claim any portion of it? Clearly not. Suppose there was a house upon it, and that the house was empty, could he say, "I will go and reside in that house; I am a partner; I have a right, as a tenant in common, to make use of this property in common; this house is empty, and I will take my family and pass my summer recess there?" Could he do that? He could not. Could any two or more of them, against the rights of others, do so? Clearly not. He has not a right to step upon the land, as land, and his whole interest is in the shares which he has purchased generally in the banking company, representing the dividends and profit to which he is entitled in respect of those shares. Would any encumbrance of his affect that real estate so bought? Clearly not. Would any interest in that real estate descend to his real representative? Clearly not. What is his interest beyond that of its being property which represents, for the time being, a portion of the capital out of which his profit is to come? This partner has not any higher interest, and never can obtain any higher interest, in respect of his shares, than as an individual partner seeking profit out of the property of the partnership, in whatever shape that property may be found. Observe what the difficulty would be. If he dies at one moment, you find no real property, but you find the same interest, the same capital to be disposed of, and the same beneficial interest, neither more nor less. If he dies at another moment, you find some real property. Could that alter the distinction, or could it alter either the *quantum* of interest or the nature of the property to be given by him? Clearly not, because his legatees would take neither more nor less than just the same interest, if there was no real property purchased, which they would take if there was real property purchased. Therefore, upon all principle, I should hold it to be perfectly clear that this is not a property within the act of parliament.

Now, the authorities are certainly difficult to reconcile, but all the

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later authorities tend, no doubt, one way. The case of probate duty, for example, introduces no difficulty on my mind any more than the cases cited out of the Term Reports. The land does not cease to be liable to its ratability to poor-rates and any other rates; you cannot exempt it, except by an express act of parliament. But that does not alter the question at all, of what your interest is in a fund composed of other property as well as that, and out of which your interest arises. It may be liable, just the same as stock in trade is liable, by law, except so far as it is annually exempted from the liability by law. Stock in trade is as much liable as real estate is. We do not think so, generally speaking, because we know it is not rated; but it is equally ratable, and it is only because parliament exempts it by special act of parliament, from time to time, that it is not rated. That will not touch it. Probate duty touches it much less, because that is a simple fiscal law, and the question is, in what respect is property charged? Its being charged for the sake of revenue can in no respect touch the rights of parties in that respect, independent of the revenue.

Now, I think those questions do not touch the case. A more difficult question, if there be one, was with respect to the cases in which, notwithstanding a similar declaration, the Court of Common Pleas held that partners had still an individual right of voting in respect of the property. I admit there is considerable difficulty in reconciling that with the other authorities, because the act of parliament — I am speaking of the act of parliament as to the right of voting — merely says the equitable right shall be as good as the legal right; and the Court of Common Pleas was of opinion, that notwithstanding the clause in the partnership deed declaring the property should be considered as personal estate only, yet real property, which they had purchased for the purposes of carrying on their trade, and vested in two trustees, was property in which they had all an equitable interest, in respect of which they had a right in voting. That is touching the point very closely, no doubt, but it turned upon this, or else it is inconsistent with the other cases, that you cannot take away that right of voting in respect of property, except by act of parliament. It is an inherent right, while the property remains, which you cannot divest yourself of. It is either that, or it is not distinguishable from the other cases.

But that very same Court of Common Pleas, which held that doctrine, has now, by its certificate, told me that it holds that this case now before the court does not fall within the principle of that case. I am relieved, therefore, from that authority, so far as it is supposed to bear upon that case; because the same court has certified to me that they are of the opinion that the case does not fall within the Mortmain Act. Therefore, although they were of opinion, upon grounds which they deemed satisfactory, that the right of voting remained under the act relating to elections, yet they were of opinion that doctrine did not extend to a case in respect of a right of property beyond the right of voting. I think, therefore, looking at the current of authorities, I must say I entirely agree with them as to the general

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principles, although some of them have gone a good deal further than that which is now before me. I think that last case before Lord Langdale, M. R., went further than the case before me, for there was, as regards the bonds, an actual assignment of the undertaking and of the rates, and therefore that case no doubt clashes with other cases, and has to be maintained upon the authority of that learned judge. I am not called upon to express any opinion about that, because this case is not open to the same observations. This is a case in which I consider the interest simply that of a partner in a general concern, part of which concern they had at the time possessed as real property, but not as real property in which it can be predicated of any partner that he has any interest. Properly speaking, he has his interest only in the partnership, the property of which may or may not, according to the circumstances, consist partly of real estate. My opinion clearly is, that the certificate of the Court of Common Pleas rightly tells us what the law is; and in conformity with that certificate I must hold, that in this case the property was well given to the charity.

ABREY v. NEWMAN.¹

December 12, 1852, and January 29, 1853.

Will — Per Capita — Practice — Parties.

Gift of personalty, to be equally divided between J. and A. for the period of their natural lives, after which to be equally divided between their children:—

Held, that on the death of A., J. was entitled to a life interest in one moiety, the remainder to be divided between the children of J. and A. *per capita*.

Declaration made in a suit in the absence of parties interested.

THE will of Henry George Hallett, dated the 30th October, 1827, contained the following words—"I bequeathe unto my wife, Ann Hallett, all my household furniture, goods and chattels, plate and linen, whatever they may consist, with book debts, &c., for her sole and separate use; and I likewise bequeathe to my said wife, Ann Hallett, the house we now dwell in, for her sole use during her natural life, as by deed of settlement; also the business which is now carried on by me, Henry George Hallett, to be at her discretion to dispose of or otherwise, for the period of fourteen or twenty-one years after my decease; and after the decease of my wife, Ann Hallett, all the above-named property to be equally divided between Benjamin James, harness maker of Borrell's-road, Clapham, in the county of Surrey, and his wife, Ann James, and Charles Abrey, of Great Burnstead, near Billericay, in the county of Essex, and his wife, for

¹ 17 Jur. 158.

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the period of their natural lives; after which, to be equally divided between their children—that is to say, the children of Benjamin James and Charles Abrey above named.” The testator died in 1841. The wives of James and Abrey died in his lifetime. Abrey had nine children who survived the testator, three of whom were since dead. James had four children who survived the testator, one of whom was since dead. A bill was filed by Abrey and his six living children against James and his three living children, and against the executors, for administration of the testator’s estate. The only question to be argued was, whether the children of Abrey and James took *per capita* or *per stirpes*. No report had been made, but affidavits of the state of the families were produced in court, when it appeared that some of the children were dead, and their representatives not before the court. His Honor objected that he could not decide this without these parties; but on sects. 50 and 51 of the Chancery Amendment Act, by which the court is empowered to make a declaratory decree, and to proceed without having all the parties interested before the court, being referred to, his Honor decided that the cause could proceed, though he thought that there was considerable difficulty.

Shebbeare, for the plaintiffs, the children of Charles Abrey, contended that the property was divisible *per capita*, and not *per stirpes*; and cited *Barnes v. Patch*, 8 Ves. 604; *Lincoln v. Pelham*, 10 Ves. 166; *Smith v. Streatfield*, 1 Mer. 358; and *Rickaby v. Garbon*, 8 Beav. 579.

Marett, for the children of Benjamin James, contended that the children took *per stirpes*, and cited *Willis v. Douglas*, 11 Jur. 702, and *Arrow v. Mellersh*, 1 De G. & S. 355. If, however, the court should decide that the children took *per capita*, then on behalf of Benjamin James he contended that Benjamin James took a life interest in the whole, otherwise there would be an intestacy as to the dividends on the shares given to the children of Abrey during the life of James, as there was no gift of the interest of their shares after the death of Abrey. The words “equally to be divided” would be controlled by the context. *Wms. Exors.* 1154; *Pearse v. Edmeades*, 3 Y. & C. 246.

[J. ROMILLY, M. R. Suppose 200*l.* given in this manner, why should we not on the death of Abrey divide 100*l.*, and on the death of James divide the other 100*l.* ?]

The property is not divisible on the death of Abrey, as James may have after-born children who will share.

Bagshawe, for the other parties.

Shebbeare, in reply.

January 29. ROMILLY, M. R. This case arises upon the construction of the will of a testator named Henry George Hallett: the words of the bequest upon which the question arises are these:—

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[His Honor read them.] James's wife and Abrey's wife are both dead, leaving children, and Charles Abrey is dead, and Benjamin James is alive; and the question is, how the shares are now to be divided. On one side it is contended that only the children of each will take the share of their parent; and on the other side it is contended that the children take *per capita*; and as authorities, the cases of *Barnes v. Patch*, 8 Ves. 604; *Lincoln v. Pelham*, 10 Ves. 166; and *Rickaby v. Garbon*, 8 Beav. 579, were cited, which decide that the fund is to be distributed *per capita*, and not *per stirpes*, when it is to be paid on a particular event. So, where there are legacies between and among the children of two persons; as in *Malcolm v. Martin*, 3 Bro. C. C. 49. Nor have I found any decision contradicting this. What the court distinguish is, when a share is given to the parents in the first instance for life and a gift afterwards to take effect on death; as in *Arrow v. Mellersh*, 1 De G. & S. 355. The case, before me, however, is distinguishable from that case, because the words here used seem to exclude that construction. Here it is not allowable to read the words as respective children, for the testator has added the words, "that is to say, the children of Benjamin James and Charles Abrey above named," to exclude that construction. This is also confirmed by the case of *Smith v. Streatfield*, 1 Mer. 358, which is as nearly as possible the case before me, without being identical. This is very close to the present case, and in my opinion it is in accordance with other authorities, and must govern the construction of this. One half of the dividends will be paid to Benjamin James for his life; the remainder is divisible *per capita*. The costs must come out of the estate.

NORMAN'S TRUST.¹

February 25, 1853.

Settlement—Unmarried.

By a marriage settlement a fund was settled, as to one moiety, for the benefit of the children after the death of the parents; and as to the other moiety, after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, and in default of appointment, to such persons as would have been entitled to the residue of her personal estate, if she had died intestate and without being married. The wife died in the lifetime of the husband, leaving two children:—

Held, that the children were not entitled to the second moiety.

By a settlement, dated the 22d April, 1842, and made on the marriage of Mr. and Mrs. Norman, it was declared that the trustees thereof should hold the sum of 19,469*l.* consols, lately standing in the name of Mrs. Norman, upon trusts, as to one moiety thereof,

¹ 17 Jur. 154.

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and the interest thereon, to pay the interest to Mrs Norman for life, with remainder to Mr. Norman for life, with remainder in trust, for such of the children of Mr. and Mrs. Norman as Mr. and Mrs. Norman, or the survivor of them, should appoint; and in default of such appointment, then upon trust for the children in manner therein mentioned; and in case there should be no child, then upon trust for the survivor of them, the said George Bethune Norman and Anna Elizabeth Norman: and as to the other moiety, and the interest thereof, upon trust to pay the interest to the separate use of George Bethune Norman for life; and in case the said George Bethune Norman should die in the lifetime of the said Anna Elizabeth Norman, then from and after his decease the said last mentioned moiety, and the interest thereof, should be in trust for the said Anna Elizabeth Norman, her executors, administrators, and assigns, for her and their absolute use and benefit; but in case the said Anna Elizabeth Norman should die in the lifetime of the said George Bethune Norman, it was thereby agreed and declared that the trustees should, from and immediately after the decease of the said Anna Elizabeth Norman, leaving the said George Bethune Norman her surviving, stand and be possessed of the said last mentioned moiety upon such trusts as the said Anna Elizabeth Norman should direct or appoint; and in default of such direction or appointment, and as to so much and such part and parts of the same trust money or stocks, of or concerning which no such direction or appointment, should be made, upon trust for and for the benefit of such person or persons as, at the decease of the said Anna Elizabeth Norman, would have been entitled to the clear residué of the personal estate of the said Anna Elizabeth Norman, under the statute for the distribution of the personal estate of intestates, in case the said Anna Elizabeth Norman had died intestate and without being married. There were three children of the marriage, two of whom survived Mrs. Norman, who died in 1851, without having made any appointment of the last mentioned moiety. The trustees paid the money into court, and the children, by their father as next friend, now presented their petition, that the last mentioned moiety might be transferred to their account.

Bacon and T. Stevens, in support of the petition. The only question in this case is, what is the meaning of the words "without being married." We contend that they mean without being married at the time of her death; in fact, as if the words used had been "a widow;" and that the money goes to her children. Her state at death is to be ascertained, not as a fact, but in order to ascertain who are to take under the Statute of Distributions. *Maberley v. Strode*, 3 Ves. 450; *Bell v. Phyn*, 7 Ves. 453; *Maugham v. Vincent*, 18 Law J. Rep. (N. S.) Chanc. 329; 4 Jur. 452; and *Doe v. Rawding*, 2 B. & Al. 441, were cited.

W. N. Warren, for the next of kin of Mrs. Norman, and for the trustees of the settlement of one of the next of kin, was not heard. See 1 Jarm. Wills, 455.

W. M. James and Greene, for other parties.

KINDERSLEY, V. C. I feel so strongly on this case that I need not trouble you. I think the children are excluded as to this half. [His Honor then read the material parts of the settlement.] The words "without being married" are capable of two meanings, either "without having been married," or "unmarried at the time of death;" but the natural *prima facie* meaning of the words, taken *per se*, is, "without having been married." That is recognized by Lord Cottenham in this very case of *Maugham v. Vincent*. He does not say the primary meaning of the words is "dying without a husband living;" on the contrary, he recognizes that the primary meaning, without any distinction between a will and a settlement, is "dying without having been married;" and he says, "the general question," &c. He decides that they may mean "never having been married," if the instrument requires it. There is no allusion to the distinction between a settlement and a will, and if there had been that distinction, the cases cited would have been answered in that manner. Nor do I see why there should be any such distinction. Here the words used are admitted to be capable of two meanings; but the *prima facie* meaning is, "without having been married." [His Honor then commented on the cases cited.] Now, here a sum of 20,000*l.* is settled, and the parties think fit to divide it into two parts. As to one part, it is limited to pay the income to the wife for her separate use, and after her death to the husband for his life, and after the death of the husband and wife, upon trust for the children, in such a manner as the husband and wife shall appoint, and in default of appointment, then to the children, so that the children are not unprovided for. The other half they agree to settle upon trusts for her separate use during her life, and if she dies during the lifetime of her husband, she is to have an absolute power of appointment, which will enable her to give it to her children. That makes this case different from *Maugham v. Vincent*, where Lord Cottenham relied upon the improbability of the parties meaning to exclude the children. Another point is of importance — that is, the terms and purport of the instrument: for carrying out one intention, the words are apt; for the other, they are totally inappropriate. If the intention was, that, in the event of the wife dying in the lifetime of the husband, it was to go to the children, nothing would have been simpler than to express that. Any draftsman would have used different words from those here used; that is no slight reason. But the ground on which I decide is, that the words may mean one or the other; but the natural and primary meaning is, "without having been married;" and I find nothing in the instrument to show an intention to use them in any other sense; on the contrary, there is some indication that they did not mean to use them otherwise. My opinion is, that the children are not entitled to this moiety.

Petition dismissed, without costs.

Melling v. Bird.

MELLING v. BIRD.¹

February 25, 1853.

Company — Petitioner — Costs.

Where an estate is directed to be sold, and the proceeds to be distributed, the persons entitled to receive the proceeds may petition for the payment out of money paid into court, under the Lands Clauses Consolidation Act, as purchase-money for part of the estate.

A transfer from one account in court to another, is payment out of court, within the meaning of the act.

Where one of several persons entitled petitions under the act, and serves the other persons, it is not of course that the company should pay the costs of such respondents.

IN this case a suit had been instituted for the administration of the estate of a testator who had devised his real estates on trusts for sale, and for distribution of the proceeds of the sale, and the plaintiffs were entitled to one tenth of the proceeds. The London and North-Western Railway Company had taken a part of the real estate of the testator, and paid the purchase-money (323*l.*) into court, in the usual manner. The plaintiffs now presented a petition, praying that this sum might be transferred to the credit of the suit, and that the company might pay the costs of the application; and the petitioner served the trustees and the persons entitled to the other nine tenths, who appeared by four different solicitors.

Baily, Follett, Fleming, and Eddis, for some of the parties.

- *Speed*, on the part of the railway company, objected to the payment of the costs. The court has no jurisdiction to order payment of costs, except where it is expressly authorized by act of parliament. *Re Isaac*, 4 M. & C. 11. Now, here the petition is presented by persons entitled to one tenth of the proceeds of the sale; and they do not come within sect. 70 of the Lands Clauses Consolidation Act, which only authorizes persons entitled to the rents to apply. Next, this is not an application for payment of money out of court, but merely for a transfer; and the costs of interim investments, and also of payment out of court, have been refused where such costs were not expressly directed by special acts to be paid. At all events, the company cannot be compelled to pay the costs of the respondents, owners of the other nine tenths; they were not necessary parties; and even if they were served, they ought not to have appeared. (See 2 Dan. Ch. Prac. 1203; *Hare v. Smith*, 14 Jur. 55.)

KINDERSLEY, V. C., expressed his opinion that the petitioners had power under the act to petition. They were entitled to one-tenth of

¹ 17 Jur. 155.

Baillie v. Jackson.

the proceeds of the sale, which would include, of course, one tenth of the income of the estate. As to the question whether the Court had jurisdiction to direct payment of the costs of a transfer from one account to another, his Honor quite concurred in the position, that, unless jurisdiction was given by the act, the court had no jurisdiction; and the question was, whether this came within one of the cases mentioned by the act; and one of the cases is the payment of the fund out of court; and though this was not exactly a payment out of court, but a transfer from one account in the Accountant-General's name to another, yet it was, in fact, payment out of court in one matter, into court in another matter, and comes within the jurisdiction as to costs. The last question was, whether these parties ought not to pay their own costs. Now, it appeared to his Honor, upon the authorities, as well as upon the good sense of the matter, that the company is bound to pay the costs of all parties who ought to be served; but upon an application of this sort, consistently with that rule, if there be a great number of persons entitled to aliquot shares, and one of them petitions, and serves the others, it is by no means of course that the company should pay these costs. Here the petitioners are entitled to one tenth, and nine others appear, four of them separately. In his Honor's opinion, the petitioners ought to have applied to the other persons having just the same interest as themselves, and asked them to join in the petition. There might have been good reason why they would not join, and there might be good reason why the company should pay their costs. The trustees should not join, and should have their costs, but the court ought not to order the company to pay the costs of any except the petitioners and the trustees. The other parties may have their costs as part of the costs in the cause, but that forms no part of this order.

BAILLIE v. JACKSON.¹

February 16, 1853.

Chancery Amendment Act, s. 22, and the 14 & 15 Vict. c. 99, s. 14.

A certificate of the registration of a deed by a registrar of deeds in a colony, who was not authorized to administer an oath, is not made evidence by the 22d section of the Chancery Amendment Act, but the signature of the registrar must be proved.

Smythe mentioned this case, which he had on a previous day mentioned before the lords justices, who desired that he should mention it to the full court. The point was, whether the certificate of the registrar of deeds, from the register office of the island of St. Vincent,

¹ 17 Jur. 151.

Boys v. Bradley.

of the registration of a deed in that office, was to be received in evidence, under the 22d section of the 15 & 16 Vict. c. 86, without a formal affidavit to prove the handwriting of the officer. He referred to the 14 & 15 Vict. c. 99, s. 14, and the 15 & 16 Vict. c. 86, s. 22.

THE LORD CHANCELLOR, (Lord Cranworth,) after considering the sections with lords justices, said:—The objection that strikes me upon this point, is precisely the same that struck the lords justices when the case was mentioned to them; and it is this—that reading this 22d section in the most favorable way for you, it will stand thus,—“and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, *person*,” &c.; that is, “any such person.” What person? When we look to the previous part of the section, we find the answer—“or person lawfully authorized to administer oaths in such country.” I am afraid this person was not one “authorized to administer oaths,” and that the case does not fall within the section.

Smythe admitted that the register officer was not authorized to administer oaths.

BOYS v. BRADLEY.¹

January 14, 15, and 22, 1853.

*Will—Construction—Uncertainty—Nearest of Kin—“Male Line”
—“Female Line.”*

S., the testator, by his will, gave personalty to be accumulated for twenty-one years, and then to be paid to “my then nearest of kin in the male line, in preference to the female line; . . . the inheritor of my said capital property to bear and use the arms, with due differences, which may at any time previous to my decease have been granted to me; . . . the party not to be put into possession till twenty-one years of age.” The testator died a bachelor, leaving two brothers, who both died bachelors; three sisters, who died spinsters; and three other sisters, who were married. Of all these, only one sister, and no brother, survived the period of twenty-one years. Two of the married sisters had sons, who survived. The testator had a cousin, a son of a paternal uncle:—

Held, as between these three parties—namely, the sole surviving sister, the sons of sisters, (the nearest male relatives of the testator,) and the cousin—and the next of kin claiming for uncertainty, that the surviving sister was entitled.

The court will not, except as the very last resource, decide in favor of an intestacy for uncertainty.

“Male line,” when a testator dies without children, held equivalent to “*ex parte paternâ*.”

Inheritor, heir, party, &c., are nouns of number, and do not exclude females, nor a plurality of takers.

¹ 17 Jur. 159.

By his will, dated the 13th July, 1816, George Sayer, C. B., then a commodore in the Royal Navy, after certain specific and pecuniary legacies, directed all the rest of his property to be invested in consols, in the names of his two brothers and his surviving sisters who should be unmarried at the time of his death, upon trust to pay three fourths of the dividends equally among such of his two brothers and six sisters as should be living at the time each dividend became due, and to pay the remaining one fourth for the education and maintenance of the children of his brothers and sisters, equally, according to the number of such children who should be alive at the time each dividend became due; with sundry provisions as to separate estate of married women, &c.; and then the testator proceeded: — “At the death of the last survivor of my nephews and nieces, whether born before or after my death, the capital sum which at the death of the last survivor of them may be standing, in virtue of this my will, in the books of the Bank of England, shall become the property of the nearest of kin to myself in the male line, in preference to the female line, upon the conditions of the inheritor thereof assuming the surname of ‘Sayer’ only, if not of that surname, and that the inheritor of the said capital sum shall bear and use, according to the law in such case enacted, the arms, with due differences, which may have been at any time previous to my death assigned to me; in default whereof, the next in lawful succession, and successively the heir or successor who shall legally comply with these conditions in respect to the surname and the arms, shall become entitled to the said capital sum; provided, nevertheless, that no inheritor of the same shall become entitled thereto, or be put in possession thereof, until the party shall have attained the age of twenty-one years.” The testator, on the 29th March, 1831, being then a rear-admiral, made a codicil, by which, noticing the change in his rank, and the improved circumstances of his brothers and sisters, he directed, that instead of the dividends of his whole property being distributed as in his will directed, the dividends on 10,000*l.* consols only should be paid among the survivors of his brothers and sisters; and proceeded thus: — “And I now direct, that the interest and dividends of all the remainder of my stock, over and above the interest of 10,000*l.*, 3*l.* per cent. annuities, shall be invested half-yearly as it becomes payable from time to time, and in like manner the interest and dividends of the invested interest, in the 3*l.* per cent. annuities, in order that the same shall accumulate until the expiration of twenty-one years from and after my decease, at the termination of which period of twenty-one years the whole capital sum then standing in the books of the Bank of England in virtue of my will, and this a codicil thereto, shall remain to be disposed of towards my then nearest of kin in the male line, in preference to the female line, under the conditions and restrictions as in my said will set forth by me, the said inheritor first paying therefrom the interest of 10,000*l.*, 3*l.* per cent. stock, to the survivors of my brothers, sisters, nephews, and nieces, until the death of the last survivor of them, in the proportions prescribed by my will in their behalf, and in behalf of their children, if any, until the death of the said last survivor.” By

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a memorandum indorsed on the same codicil, the testator gave various articles in the nature of heir-looms, such as "his gold medal for Java, his gold snuff-box presented to him by the King of the Netherlands," &c., to be preserved by his brothers, "to descend, with the patent and painting of my armorial bearings, to the inheritor hereafter of my capital property, and to the descendants who may from time to time succeed thereto."

The testator died on the 29th April, 1831, a bachelor, leaving his two only brothers, Charles and Benjamin, and six only sisters, three married, namely, Mrs. Judith Innes, Mrs. Elizabeth Boys, and Mrs. Jane Bradley, and three unmarried, Mary Sayer, Susannah Sayer, and Caroline Sayer. Benjamin Sayer, and upon his decease Charles Sayer, proved the will, and became the legal personal representative of the testator. The father of the testator died before the date of the will. The mother of the testator died in 1824. At the time of the decease of the testator, his said two brothers and six sisters were his only next of kin, according to the Statute of Distributions. Benjamin and Charles were then both bachelors, and so continued, and died after the testator, without issue, before the filing of the bill. Three of the testator's sisters, Mary, Caroline, and Susannah, had also died, spinsters, before the filing of the bill. Mrs. Innes died in 1844, and had never had any children. Mrs. Boys died in 1833, having had four children, three sons and one daughter, who were all still living. Mrs. Bradley had had six children, four daughters and two sons, one of whom, a son, died in 1840; the other five children of Mrs. Bradley were alive; and all these parties, or their representatives, were before the court. The testator's estate consisted wholly of personalty, both at the time of making his will and up to the time of his decease. The period of twenty-one years, directed for accumulation, expired on the 29th April, 1852, at which time the whole fund amounted to nearly 75,000*l*.

Mrs. Bradley was then the sole survivor of the brothers and sisters of the testator, and she and her husband claimed in right of her as nearest of kin, that is nearest in blood, to the testator. The eldest son of Mrs. Boys claimed as representing the nearest of kin "in the male line," better than Mrs. Bradley, a female; and a third claimant, Captain Sayer, son of a deceased paternal uncle of the testator, alleged that the words "nearest of kin in the male line" meant nearest male relation claiming "relationship wholly through males." The other nephews and nieces, and the personal representatives of the deceased brothers and sisters of the testator, took advantage of these various interpretations, and contended for an intestacy on the ground of uncertainty.

Russell and E. G. White, for the plaintiffs, the trustees, took no part in the discussion.

The Solicitor-General (Bethell) and *Giffard*, for the defendants, Mr. and Mrs. Bradley. The word "line" is a metaphysical expression. Every man has two lines of kindred, ascending and descend-

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ing. Where a man dies a bachelor, he can only have one line, namely, the ascending, which may be either paternal or maternal. Therefore the male line of kin of a bachelor is the paternal line. You must exhaust the blood of the father before you go further; and this plain course brings the defendant, Mrs. Bradley, forward as the sole person entitled. The defendant, Boys, attempts to construe "nearest of kin in the male line" as if it were nearest of kin being a male. This would be to import into the will language for which there is not the slightest warranty. There is only one case we should wish to distinguish from the present, and it is very easily distinguishable; it is the case of *Oddie v. Woodford*, 3 My. & C. 584, reported in connection with *Bernal v. Bernal*, Id. 559. In that case the word "lineal" is always interposed between the words "male" and "descendant." The expression "eldest male lineal descendant" is very different from "nearest of kin in the male line." Then if, as the defendant, Captain Sayer, insists, you are to take a male claiming through a continuous line of males, his name would be "Sayer" and there is no occasion for the provision that the inheritor is to bear that name. This sufficiently shows that the testator did not intend to exclude females. The word "inheritor" does not point to a male any more than the word "heir." The real meaning is "nearest in blood *ex parte paterna*;" and that points to Mrs. Bradley.

[Wood, V. C. Then you would take in paternal relations who were not descendants of the father, *e. g.* the paternal grandmother?]

Certainly.

Giffard, (with *The Solicitor-General*), referred to *Witley v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; *Blackborough v. Davis*, 1 P. Wms. 41; and *Pyot v. Pyot*, 1 Ves. sen. 335.

Follett and *Charles Hall*, for the defendant, Boys. The word "line" means "generation, progeny, offspring, race;" it has no technical meaning, and the natural and popular meaning must therefore prevail.

Chandless and *Surrage*, for the defendant, Captain Sayer. The expression "male line" means naturally a line of males. Seeking along this line of males, Captain Sayer is the person to take. The Solicitor-General's interpretation is to take the nearest of kin first, and then to look for the male line.

[*The Solicitor-General*. What I say is, that you are to ascertain what is meant by the male line, and then go searching along that line till you arrive at the nearest of kin.]

Wood, V. C. Your great difficulty will be in the clause for bearing the name of Sayer.]

It is of every day's experience that the son is not of the same name of the father. The testator wishes that the son should retain his proper patronymic. The arms clause is very strong to show that it must be a male who must take. A female cannot properly inherit

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arms, nor indeed bear the arms of the testator. Co. Litt., s. 31, is express on this point. The testator always uses the singular number and masculine gender to express the person who is to take. A decision in favor of Mrs. Bradley would give the whole fund to the husband, who was never contemplated by the testator at all.

Glasse and Dickinson, for a defendant, Wilkie, claiming under an intestacy, on the ground of uncertainty, and *Roll and R. Pryor*, for another defendant in similar interest, cited *Thomason v. Moses*, 5 Beav. 77. They insisted that all the claims under the will were conjectures; all equally probable, or nearly so; and none of them quite consistent with every word in the will.

January 22. Wood, V. C., (after stating the case and the different views contended for.) The first defendant named on the record is the only surviving sister of the testator, and therefore the nearest of kin under a bequest of this character, the parties taking according to proximity of blood, and not by representation, subject, however, to the peculiar qualifications in this case. The next two defendants are sons of deceased sisters, who claim as the nearest of kin being males. There is another defendant, Captain Sayer, claiming as being the nearest male relative, in a continuous male line, to the testator; and there are the next of kin claiming under an intestacy, if the court can arrive at no conclusion between the rival claims I have just mentioned. Now, in the outset I may remark, that an intestacy is the very last result at which the court can arrive. The cases are numerous which show this. *Pyot v. Pyot* is sufficient to show the rule; and notwithstanding the difficulty which Lord Hardwicke felt in that case, he yet gave effect to the devise. Nothing, I apprehend, can be clearer, than that where the testator makes dispositions of this character, he intended to make some bequest—to give his property in some manner—not to die intestate. Therefore it becomes the duty of the court to scrutinize the several constructions. The only external circumstances, de hors the will, which I have thought it proper to take into consideration, are, the state of the testator's family, and also the fact of the grant of arms; and, with this view, I have examined the patent itself. If I come to the conclusion that all the views propounded by the three first-named claimants are equally consistent with the will, or that none of them is quite consistent, then, and in these two cases alone, as I apprehend, I am bound to pronounce for an intestacy. Two things, I think, are clear on this will; first, that the testator intended to give to his nearest of kin, not to his next of kin, in the technical sense of that expression—not to give any thing to the representatives of any person, according to the provisions of the Statute of Distributions; and, secondly, that he intended some qualification on this gift, that is, he intended the male line to take, in exclusion of the female line. It was, indeed, suggested in argument, that a preference only was intended, because it was said the words "in the male line, in preference to the female line," might be read within a parenthesis; but I do not read the pas-

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sage so, and I have treated it as a bequest to the male line, in exclusion of the female line. Then which of the three constructions which have been pressed upon me is the most consistent with the words of the will? First, as to Mr. Follett's client, (the defendant, Boys,) claiming, not under a male line, but as the nearest male next of kin of the testator, and therefore entitled in preference to Mrs. Bradley. He insists that you must read "in the male line," as being equivalent to "being a male" simply. This is a construction difficult to arrive at, but which certainly cannot be arrived at at all unless there be a clear intention on the face of the will to exclude females. But an intention appears on the words of the will to the contrary. If we refer to the circumstances of the testator at the time of making his will and at his death, and to which the testator refers in his will, we find that he had two unmarried brothers, and six sisters, some of them married, some unmarried. There was, therefore, a great probability that whenever his bequest should take effect he would leave some female relative; and if he had an intention to exclude them, that would be very clearly marked on the face of the will. But, on the contrary, we find gifts to females just the same as to males, brothers and sisters being put on the same footing. He says not a word about the sex of the person who is to take under the ultimate trust. I observe that the words in the will and codicil are always "nearest of kin," "the heir or successor," "inheritor," "party." There is, therefore, no intention apparent on other parts of the will to exclude females, but, on the contrary, there is the name and arms clause, which I shall consider presently, and which leads to a contrary conclusion. I have, therefore, on the whole, no difficulty in saying that the claim by sons of sisters of the testator cannot be maintained. We then have to consider Captain Sayer's construction.

There is much more to be said for him than could by possibility be urged for the two sons of sisters of the testator. His case was very strongly put by Mr. Chandless, who urged, among other things, that "male line" could mean nothing else than "line of males." Now, although it may seem a small point to notice, yet I think it is not to be passed over that the testator does not say "in a male line," but "in the male line." If he had said "in a male line," that would have been more in favor of a continuous line of males. In *Oddie v. Woodford*, which was cited, the expression was very different, namely, "a lineal male descendant." The two latter words pointed out both sex and descent; and then, as Lord Eldon said, the word "lineal" must mean in a continuous line, or it can mean nothing. But further: when the property in *Oddie v. Woodford* arrived to this lineal male descendant it was to be settled in tail male; whereas here it is to be paid over at once. There is in this will no expression equivalent to "male descendant." There are words in the codicil as to those who are to take after the first taker; but neither in the codicil is there any thing equivalent to "male descendant," nor is there any such circumstances here as a settlement directed to be made in tail male. But there is in this case to be also considered the name and arms clause, which is very important. It was suggested, that although a person

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related to the testator in a continuous line of males would be of the same name, yet that such person might, as we all have known instances, have taken another name, and that this was what the testator meant to provide against.

But this is not the natural construction to be put upon such a proviso. There is nothing to show that the testator had such a contingency in view. There is no statement that such an event had already happened in the testator's family. The obvious and immediate construction is, that the testator meant to provide for the case of a female taking. The testator, it is said, does not say "take and use," but he says "bear and use," as if he had it in contemplation that the person was not to apply for the arms, but might already have them. The testator gives over his medal and other things to be preserved for the inheritor of his capital property, and the descendant who might from time to time succeed thereto — intimating an intention that they should bear these arms, and therefore should be such persons as might inherit and bear them; and Co. Litt. was cited to show that females could not inherit arms, and that they would descend to a collateral male relative, rather than to a lineal female descendant. But the passage shows that females may bear arms in some particular way, whether married or single — per pale, quarterly, or, as Coke says, in a lozenge, or under a curtain; which the testator seems to have provided for by the words "with due differences."

But if not, it would be too much to say that all the particulars of heraldry were present to the mind of the testator, when the common usage that women do bear arms must, at all events, have been before him. Then, in the grant of arms, it is a grant to himself, to his descendants, and to the descendants of his father. There is nothing in it to exclude females. I looked at it myself to see whether there was any thing in it which could assist Captain Sayer, and I found nothing. It still remains to see whether the first defendants named on the record can take — whether Mrs. Bradley can make out her construction consistently with the whole will. There is some difficulty; but I am bound to make out a construction if I can, rather than withdraw, and submit to an intestacy; and what has been said as to the other claimants removes much of the difficulty; and, on the whole, I think the view taken by this defendant and her husband is the true one, and that the nearest of blood *ex parte paternâ* must take. All the circumstances of the family point to this conclusion. The testator makes no provision for any children of his own; he was not married, and therefore contemplated no lineal descendants. He must, therefore, I think, when he speaks of a "male line," be understood to speak of the ascending male line. If the matter had stood on the will alone, I think it might have been argued, that, having made provision for brothers and sisters, and nephews and nieces, he had begun to contemplate a line of descent from his brothers on the one hand, and from his sisters on the other; and I have had some doubt whether, in fact, he was not contemplating this.

But when we come to the codicil we find it very plain. He no longer excludes his brothers and sisters, because he limits the period

for taking to twenty-one years after his decease, at the end of which period it was quite possible that some of his brothers and sisters might be alive. Then as to paying the 10,000*l.*: when he gives his residuary property to his "nearest of kin," whoever takes under that designation will not be deprived of his interest in the 10,000*l.* by thus becoming the party who has to keep down the interest on the 10,000*l.* The interest will have to be paid to the nephews and nieces up to the time of the decease of the last survivor, not only of the brothers and sisters, but also of the nephews and nieces; and therefore it was necessary, up to the decease of the last survivor of them, to have a direction as to the payment and investment. Clearly, on the face of the will, and without respect to the authorities, it was quite consistent that he should intend all his brothers and sisters to take, and yet make that disposition by his codicil as to the interest of the 10,000*l.* The only line which could take the capital property would be an ascending bifurcated line, paternal and maternal. The testator must be taken to have had so much knowledge of the law as to know that he would leave these two lines behind him.

Then, is it too much to say that he may have intended to refer to these two lines, one on the father's side, and the other on the mother's side? But in the whole will there is not a single person named related to the testator merely by the mother's side. Even in the epitaph which he directs to be placed on his monument he does not mention his mother's name. There is an entire absence of any recognition of the maternal branch; but he does mention, not only his father, but his father's father and paternal uncle. We therefore have the testator showing a marked favor to his father and paternal relatives, and no notice whatever of his maternal relatives; directing, in his codicil, certain payments and accumulations to take place for twenty-one years after his decease; and then looking back, after the decease of his brothers and sisters, when there are two lines of kindred ready to take from him, one paternal, and the other maternal. In this state of circumstances, I think the nearest of blood in the paternal line was intended by the testator; and it will scarcely be necessary for me further to examine the arguments advanced by the fourth set of claimants, namely, under an intestacy for uncertainty; for I think Mrs. Bradley is pointed out with sufficient certainty — even giving Mr. Rolt's clients the benefit of the admission, that this view might give the property to a grandmother rather than a niece of the testator. It was urged, that the person meant to take under the will was a person who would come in at a very remote period of time, and that the person intended in the codicil was the same as that intended in the will; but I do not think so. The testator, in the codicil, varies the time of appropriation, and therefore it would be unreasonable to assume that he meant the same person in both instruments. The words, it was further urged, are throughout in the singular number. That is true to a certain extent. "Nearest of kin" would take in more than one person; but "inheritor" and "party" are both singular. Both of these words may, however, be taken as nouns of multitude, as describing the class or body who are to take; and for

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this *Pyot v. Pyot* is an authority. The words there were much more strictly confined to the singular number, namely, "to my nearest relation, and his or her heirs," &c. But Lord Hardwicke held that there was not any necessity to take that as meaning a single person, saying that "relation" was as much a *nomen collectivum* as "heir" or "kindred." On the whole, I find nothing to support the position that sons of sisters are to be preferred to sisters; quite the contrary. I do not find sufficient to establish the proposition that the testator meant such a line of males as would exclude females; and I think Captain Sayer's view is not necessarily supported. But when I come to Mrs. Bradley's claim, I find that it is consistent with the whole will, and that it consists better with the whole will, and the decisions bearing upon the point, than any other view put forward. I shall only conclude by saying, that, as to two cases which were cited in favor of declaring this will void for uncertainty, the case of *Thomason v. Moses*, 5 Beav. 77, is materially distinguished from the present case, because in that case the testator, having given property in an arbitrary mode of process, namely, first to his father for life, then to his younger brother for life, proceeded to say, "and so on, to be continued to my next nearest heir;" and the court said that it was quite impossible to ascertain who or what was meant in the testator's mind by the word "heir." In *Doe v. Fleming*, 2 C. M. & R. 638, the court could not arrive at any conclusion to select one branch more than another. The court therefore said that no meaning could be assigned which went higher than conjecture, and that the will was open to several conjectures, none of which was of sufficient force to justify the court in adopting it.

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December 3, 1852.

Will — Settlement — Implied Estate tail — Curtesy.

Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross remainders in tail.

M. died unmarried, and then C., conceiving herself tenant in fee simple, in contemplation of marriage, conveyed her estate, with the concurrence of her intended husband, by lease and release, to trustees and their heirs, in trust for herself until the marriage, and after the solemnization thereof, in trust for herself for life, and then for her children, &c. There was issue of the marriage: —

Held, that the trustees took a base fee, and that the husband was not tenant by the curtesy.

Held, also, that after C.'s death, her eldest son, having elected to take against the settlement, and barred the entail, could make a good title to a purchaser from him, and such as a court of equity would compel the purchaser to accept.

¹ 17 Jur. 157.

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MATTHEW GASKELL, by his last will and testament, dated the 13th September, 1817, devised and bequeathed to his executors all his real and personal estate, upon trust to raise the sum of 600*l.* and to pay 100*l.* to his wife for her own sole use, and to be at her own disposal, and the remaining 500*l.* and a cottage in Lowton, of which he was seised in fee, to go equally between his two daughters; and upon further trust to pay to his wife, if she should continue his widow, out of the rents and profits of his leasehold estate in Burtonwood, a sufficient sum of money for the maintenance, education, and bringing up of his said two daughters until they should attain the age of twenty-one years or be married, which should first happen; but if his said wife should happen to marry again, then it was his will and mind that his said executors should have the charge, and management, and bringing up, and maintaining of his said daughters until they should attain the age of twenty-one years; and the will continued, "upon further trust, that when my daughter Catherine shall attain the age of twenty-one years, to have 30*l.* a year from the estate in Burtonwood which I purchased from the Rev. Robert Atherton Rawsborne, until my youngest daughter Margaret shall attain the age of twenty-one years, and then to have that estate equally betwixt them for and during the term of their natural lives; and I do direct that the same shall not be subject or liable to the debts, control, or engagements of any husband or husbands whom they may happen to marry, but that their receipt shall be a good and sufficient discharge to my said executors for the same; and all my personal estate and effects, upon trust, that I am possessed thereof, and the moneys out at interest, issues and profits thereof, and pay, apply, and dispose of the same unto my said daughters, Catherine and Margaret, equally, share and share alike; and in case both my said daughters shall die without leaving lawful issue, then" upon the further trusts therein mentioned.

Matthew Gaskell died on the 14th January, 1818, leaving his widow, Sarah Gaskell, and his said daughters, Catherine Gaskell and Margaret Gaskell, who were his only children and co-heiresses at law, surviving him. Margaret Gaskell died on the 7th May, 1822, an infant and unmarried. Catherine Gaskell, on the 19th July, 1827, intermarried with Thomas Robinson. Previously to and in contemplation of such marriage, indentures of lease and release, dated the 3d and 4th July, 1827, were made and executed, the release being made between the said Catherine Gaskell of the first part, the said Thomas Robinson of the second part, and Thomas Gaskell and James Battersby of the third part; and thereby, after reciting the said intended marriage, and that upon the treaty of the said intended marriage, it was agreed that the real and personal estate and effects whatsoever, late of the said Matthew Gaskell, deceased, to which the said Catherine Gaskell then was, or at any time thereafter might become entitled in possession, reversion, or otherwise, and also all and singular other the real and personal estate and effects whatsoever of or to which the said Catherine Gaskell was then seised, possessed, or entitled in possession, reversion, or in anywise howsoever, should be respectively conveyed, assigned, settled, and assured, upon and for

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the trusts, intents, and purposes, for the benefit of the said Catherine Gaskell and her issue, in the manner thereafter contained, it was witnessed, that in pursuance and part performance of the said agreement, and in consideration of the said intended marriage, and for settling and assuring the hereditaments intended to be thereby released, she, the said Catherine Gaskell, with the privity and approbation of the said Thomas Robinson, did grant, bargain, sell, alien, and confirm, and the said Thomas Robinson did grant, ratify, and confirm, unto the said Thomas Gaskell and James Battersby, and to their heirs and assigns, first the said messuage, lands, and hereditaments at Burtonwood; secondly, the said cottage and hereditaments at Lowton; and, thirdly, the said lands at Burtonwood to which the said Matthew Gaskell, deceased, was entitled under a lease for lives; and also all and singular other the hereditaments of or to which the said Catherine Gaskell, or any person in trust for her, was or were seised, possessed, or entitled by virtue of the said will of the said Matthew Gaskell, deceased, or in her own right, or otherwise howsoever; to hold the same, with the appurtenances, unto the said Thomas Gaskell and James Battersby, their heirs and assigns, as to such parts thereof as were freehold of inheritance, to the use of the said Thomas Gaskell and James Battersby, their heirs and assigns forever, but subject to such estate as the said Sarah Gaskell had in the said cottage at Lowton during her widowhood, under the said will of the said Matthew Gaskell; and as to such parts of the said premises as were of leasehold tenure, to the use of the said Thomas Gaskell and James Battersby, their heirs and assigns, during the estate therein then unexpired, subject to the rents and covenants as therein aforesaid; but as to the whole of the said premises, upon the trusts and for the purposes thereafter contained.

And it was thereby further witnessed, that, for the considerations aforesaid, she, the said Catherine Gaskell, with the approbation of the said Thomas Robinson, assigned, and the said Thomas Robinson granted, ratified, and confirmed, unto the said Thomas Gaskell and James Battersby, their executors, administrators, and assigns, the several sums of money therein mentioned, and all and singular other the personal estate and effects of the said Matthew Gaskell, deceased, of or to which the said Catherine Gaskell was possessed or entitled in anywise howsoever, and all other the personal estate of the said Catherine Gaskell, to hold the premises thereby assigned unto the said Thomas Gaskell and James Battersby, their executors, administrators, and assigns, subject, as to the sum of 600*l.* therein mentioned, to such interest as the said Sarah Gaskell had therein during her widowhood as aforesaid, but upon the trusts thereafter contained; and it was thereby declared that the said trustees should stand seised and possessed of the real and personal estate and premises thereby assigned, and the interest, rents, issues, profits, and annual produce thereof, in trust for the said Catherine Gaskell until the said intended marriage; and after the solemnization thereof, in trust for the said Catherine Gaskell during her natural life, for her separate use; and from and after the decease of the said Catherine Gaskell, as to, for,

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and concerning the said messuages or dwelling-houses, lands, tenements, and hereditaments, real estate, household goods, and furniture, and premises thereby released and assigned respectively as aforesaid, upon trust to sell the same in manner therein mentioned; and as to the money to arise by such sale, it was declared that the said trustees should stand possessed thereof in trust for all and every the children and child of the said Catherine Gaskell, as well by the said Thomas Robinson as by any future husband, in manner therein mentioned; and in case there should not be any child of the said Catherine Gaskell who should attain a vested interest in the said trust moneys, stocks, funds, and securities, then from and immediately after the decease of the said Catherine Gaskell, and failure of her issue as aforesaid, the said trust moneys and premises, and the securities for the same, and the interest, dividends, and annual produce thereof, and also the hereditaments, real estate, goods, furniture, and premises thereby released and assured, not actually sold, should be in trust for the said Thomas Gaskell, a party thereto, his heirs, executors, administrators and assigns, to and for his and their own absolute use and benefit.

The said Catherine, the wife of the said Thomas Robinson, died in June, 1842, and she did not levy any fine, or suffer any recovery, or execute any disentailing assurance of the said testator's freehold estates of inheritance. There was issue of the marriage between the said Thomas Robinson and Catherine Robinson four children, namely, Thomas Gaskell Robinson, her heir at law, Matthew Robinson, Catherine Robinson, and Margaret Robinson. Thomas Gaskell Robinson entered upon the entailed lands, and executed a disentailing deed to his own use in fee simple, and on the 13th March, 1851, he contracted to sell the said hereditaments and premises, together with certain other property, to the above-named defendant, Thomas Gaskell; and the said Thomas Robinson, in respect of his interest, if any, concurred in such contract. An objection was made to the title, on the ground that under the will of the said testator, Matthew Gaskell, and the events which had since happened, and the said subsequent dealings with the estate, the said Thomas Gaskell Robinson did not, on the death of the said Catherine Robinson, become tenant in tail of the said hereditaments, but that the same descended on the said Catherine Robinson in fee simple, as heir of her said father and sister, and were therefore effectually conveyed by her said marriage settlement; or that if the said Thomas Gaskell Robinson did become such tenant in tail, then that the said marriage settlement operated as a settlement of the estate by the curtesy which the said Thomas Robinson would have been entitled to if such settlement had not been made. The questions for the opinion of the court were — first, whether, under the will of the said Matthew Gaskell, and the events which subsequently happened, and the subsequent dealings with the estate, the said Thomas Gaskell Robinson did, on the death of the said Catherine Robinson, become tenant in tail of the said messuage, lands, and tenements at Burtonwood, of which the said Matthew Gaskell was seised in fee simple as aforesaid, or whether the said

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Catherine Robinson was tenant in fee simple thereof, or what other estate or interest she had therein; secondly, if the court should be of opinion that the said Thomas Gaskell Robinson did become such tenant in tail, then whether the said marriage settlement did or did not take effect as a settlement of the said hereditaments during the life of the said Thomas Robinson; and, thirdly, whether, in respect of the said ground of objection, a good and marketable title to the said hereditaments could be made.

J. V. Prior, for the plaintiff, argued that the will conferred estates tail on Catherine and her sister as tenants in common, with cross-remainders in tail; and that as Catherine's estate tail was not barred, nothing beyond her life interest was bound by the settlement. On the first point he referred to *Parr v. Swindels*, 4 Russ. 283.

Follett and *W. M. James*, for the defendants, argued that the will did not confer estates tail, but estates for life on Catherine and her sister; for admitting that if this had been a gift to one person only, with a similar devise over, it would have passed an estate tail, that principle would not govern this case, where the gift was to two persons who could not intermarry, namely, Catherine and her sister, and there was no authority that from such a gift, with a devise over of this kind, an estate tail would be implied. It was because of the absence of authority that the opinion of the court was required on this point. If they took life estates under the will, the reversion in fee, being undisposed of, in the events which had happened, had descended upon Catherine, and was well settled on her marriage. However, if Catherine took an estate tail, her husband concurred in the settlement, and it would bind his estate by the curtesy at any rate, or the children might have a right to have the settlement rectified in their favor; so that in any case her eldest son could not alone make a good title.

STUART, V. C., said that he thought it was very clear that the will conferred estates tail on Catherine and her sister by implication, and that the settlement vested a base fee in the trustees.¹ His Honor thought that the husband of Catherine took no estate by the curtesy, and on that point he referred to the judgment of Lord Hardwicke in *Casburne v. Scarfe*, 1 Atk. 603; 2 J. & W. 194. His Honor observed that he was not now called upon to compel the purchaser to take the title; but if he had been, he should have felt no hesitation about it. The objection was ingenious, but one which he thought the court would do very unwisely to entertain. He was of opinion that the title was marketable.

¹ See *Machell v. Clarke*, 2 Ld. Raym. 778.

RODGERS v. NOWILL.¹

February 22, and March 1, 1853.

Breach of Injunction — Motion to Commit — Acquiescence.

Acquiescence on the part of plaintiffs who have obtained an injunction restraining the use of a trade mark, in order to constitute a valid defence to a motion by them to commit for breach of the injunction, must be such as to amount almost to a license by them to the defendants to use the trade mark.

THIS was an appeal from the decision of Stuart, V. C., (reported 17 Jur. 109; s. c. ante, p. 84,) whereby he refused to commit William Rodgers, one of the defendants, for an alleged breach of the injunction granted in the cause, forbidding the use by the defendants, on cutlery manufactured and sold by them, of the trade mark commonly used by the plaintiffs on cutlery manufactured by themselves, or of any colorable imitation thereof. The facts of the case are fully stated in the report of the motion to commit before the Vice-Chancellor.

Malins, Q. C., and Shee appeared for the plaintiffs, in support of the appeal; and

Bacon, Q. C., and Osborne, for the defendants, contra.

KNIGHT BRUCE, L. J. I think this as clear a case of a contempt of an injunction as ever was brought before the court. The injunction granted, in terms forbids the use of the mark "V. R." on each side of a crown, and the words "J. Rodgers & Sons." That very mark, accompanied by those very words, has been, since the injunction, used by the defendants, which was restrained by the injunction. With regard to the additional words sometimes or frequently used, (it is indifferent which,) "celebrated cutlery," instead of varying the case, or making it better, they make it, in my opinion, if possible, worse. Now, if there had been the great delay on the part of the plaintiffs, after being aware, as it is suggested, of the fact, unless it amounted to a license, I know not that it would make the breach of the injunction better. But, upon the evidence, I do not believe that they have been aware of it. I do not believe that, if they had been aware of it, they would not have proceeded sooner, as they have proceeded now. Upon the evidence, I have no doubt whatever that this mark and these letters have been used for the purpose of increasing the sale of the defendants' cutlery, by enabling them or assisting them to pass it off as the cutlery of the plaintiffs. I am of opinion, therefore, that unless a mark can be now suggested to be used in

¹ 17 Jur. 169.

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future, which we shall think reasonable, there must be an order for committal.

TURNER, L. J. This case appears to me to be quite as clear as it appears to my learned brother. The injunction granted is to restrain the defendants from using a particular mark, or any other mark or marks so contrived or expressed as by colorable imitation or otherwise, to represent that the penknives, pocket-knives, or other articles of cutlery manufactured and sold by the defendants, are the same as the penknives, pocket-knives, or other articles of cutlery manufactured by the plaintiffs. Now, it is first said, on the part of the defendants, that the plaintiffs have abandoned the mark "J. Rodgers & Sons," and have used a different mark; but, upon the evidence in this case, I entertain no doubt whatever that the plaintiffs have not abandoned the mark "J. Rodgers & Sons;" for it stands thus:—On the one side, the affidavit says that the mark "J. Rodgers & Sons" has been, since the injunction, extensively used, or usually used, (I am not certain of the terms,) by the plaintiffs; and on the other side, we have only the affidavits of two workmen, one of whom says he made penknives for the plaintiffs for a period, I think of four years, and has been since working for his own benefit for the period of four years more; and that he made those penknives, and that he never made any for the plaintiffs with the mark "J. Rodgers & Sons;" which is perfectly consistent with the other people having made them for the plaintiffs, with the same mark, "J. Rodgers & Sons." Another witness says, "I manufactured and worked for the plaintiffs, I never made, and I never saw made, for the plaintiffs"—not that he never saw penknives made or manufactured by the plaintiffs with that mark upon them, but that he never saw them actually made. That is the expression contained in his affidavit; and, therefore, on the balance of the evidence in this case, I entertain no doubt that the plaintiffs have used the mark, "J. Rodgers & Sons," and that there has been no abandonment of it. Then, on the question of acquiescence, I take it that where, in a case of this description, there has been an injunction granted by this court, acquiescence, to be admitted as a defence to a motion to commit for a breach of the injunction, must be made out to amount to a license almost entitling the party complained of to maintain a bill for a license for the use of that mark; in fact, that it must be shown that there has been a description of acquiescence constituting an entirely new right in the defendant. It is perfectly clear to my mind that there has not been any such acquiescence as to entitle the defendants to set up any such right in themselves. I am of opinion, therefore, unless the defendant William Rodgers satisfies us that he intends to use and undertakes to use, a particular mark, which will not interfere with the plaintiffs' marks, there must be an order for commitment.

KNIGHT BRUCE, L. J. We having declared our opinion that it is a breach of the injunction, the defendant must pay the costs of the original motion, and must be committed, unless he can propose another mark which shall be satisfactory to the court.

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It was then agreed between the parties that the case should stand over for a week, for the purpose of a mark being proposed by the defendant, in accordance with the requisition of the court.

March 1. The defendant proposed to vary the mark hitherto used, by the adoption of the name of "William Rodgers," instead of "John Rodgers & Sons;" whereupon the court, upon the defendant undertaking to use no other mark than the one proposed, made no further order upon the motion, except for payment of the costs of the original motion.

COWLEY v. WATTS.¹

March 1, 1853.

Vendor and Purchaser — Contract by Letters between Agents — Specific Performance — Auction — Conditions of Sale — Incorporation.

A party directed his agent to buy a lease of a house for 3,200*l.*, and sign an agreement. This agent wrote to the agent of the owner, offering 3,200*l.* The owner wrote across the last-mentioned letter, "I agree to sell my house upon these terms;" and thereupon the agent of the owner wrote to the agent of the other party, "my employer will take your offer;" and added, "make an appointment to meet to draw the agreements." The day following, the agent of the purchaser said that his employer had closed on another house:—

Held, that the letters constituted a contract to buy, and specific performance was decreed, with costs.

A. and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A. afterwards, through his agent and the agent of the vendor, purchased the same house:—

Held, that the particulars of sale were not incorporated with the purchase, and therefore not binding on the purchaser.

THE bill in this case was filed by a vendor to compel the specific performance of a contract by Mr. Watts for the purchase of The Berkeley Arms, situate in John Street, Berkeley Square. The contract sought to be established was entered into between the agents of the parties under the following circumstances:—On the 16th March, 1851, the defendant wrote to Mr. Cronin, his agent, thus:—"I hereby authorize you to purchase the lease of The Berkeley Arms, John Street, for any sum not exceeding 3,200*l.*, and sign an agreement, according to your discretion, and pay a deposit for me, and as my agent." Mr. Cronin, on the 23d of the same month, wrote to the plaintiff's agent as follows:—"I called on your client (the plaintiff) in consequence of your letter, but his lowest price he stated to be 3,500*l.* As that was the case, I made him no offer. I am now commissioned to offer 3,200*l.*, which is our very utmost price, and I shall be glad to hear from you in a day or two on the subject.

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If my employer's offer is not taken, it strikes me the property will fall several hundreds more in realizing value." Mr. Cowley, the plaintiff, having called upon his agent on the 25th March, the foregoing letter was produced, when he wrote across it, "I agree to sell my house upon these terms;" and immediately afterwards the agent wrote to Mr. Cronin, "My employer, Mr. Crowley, will take your offer of 3,200*l.* for The Berkeley Arms. Will you, therefore, be pleased to write me an appointment to meet upon the premises to-morrow, to draw the "agreements?" The day following Mr. Cronin replied, "I beg to inform you that my employer has closed on another house. Mr. Cowley has, I think, been mistaken in holding out so long." Prior to the above correspondence taking place, the plaintiff had offered the house in question for sale at Garaway's; and it was admitted that both the defendant and Mr. Cronin were present at the auction, and that both saw the following clause in the particulars of sale:—"The vendor shall deliver to the purchaser, or his solicitor, an abstract of his title to the property comprised in this particular, which is held by two leases, the one granted by T. H. for thirty-two years from Lady-day, 1839, and the other is dated January 16, 1852, and granted by the persons claiming under the said T. H., deceased, to the vendor, and commencing Lady-day, 1869, for thirty-one years, less ten days; and it is stipulated that such abstract shall commence with such leases respectively, and that the purchaser shall not require the production of, or inquire into, or object to the lessor's title, or to the covenants in the said leases respectively contained; and all recitals contained in such leases shall be deemed conclusive evidence of the facts therein stated or recited; and the vendor shall not be called upon to produce any deed or document not in his possession, and which may be mentioned or recited in either of such leases, whether for the verification of the abstract or otherwise; and no objection shall be made or taken that the said leases are underleases, and they shall respectively be taken to have been well granted; and the last receipt for rent paid shall be deemed conclusive evidence of the proper performance of the lessor's covenants to the time of completion."

Temple and Bilton, for the plaintiff, argued that the letters of the 23d and 25th March confirmed and concluded the contract for purchase. The defence set up in the answer, that it was a mere treaty, evidenced by the words "to draw the agreements," could not be maintained. Those words referred to nothing more than the spirits and other articles remaining on the premises, and which were to be purchased by Mr. Watts by valuation and agreement between him and Mr. Cowley. The case of *Ogilvie v. Foljambe*, 3 Mer. 53, was conclusive that this was a contract concluded, and not a mere treaty to purchase. *Blakeley v. Smith*, 11 Sim. 150, and *Owen v. Thomas*, 3 My. & K. 353, also supported this view. Then, with respect to the interest of the vendor in the premises, no ignorance of that could be set up, for it was clearly admitted that the particulars of sale were well known to the defendant.

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Willcock and Rogers, for the defendant, urged that the correspondence showed a mere treaty to purchase, and not a concluded bargain; but even were it considered to be more than that, then it was not the agreement which the parties intended to enter into. It was also insufficient in point of law. It was not a contract for the purchase of a lease, but for a larger interest. *Huddleston v. Briscoe*, 11 Ves. 583; *Stratford v. Bosworth*, 2 V. & B. 341; *Hughes v. Parker*, 8 M. & W. 244.

ROMILLY, M. R. In this case there are two questions for my decision; the first is, whether the letters which have been read amount to a contract to purchase; and if so, whether it is such a contract as this court will specifically enforce the performance of. Now, as to the first, I entertain no doubt whatever. The two letters of the 16th and 23d March, and the answer to the letter of the 25th, constitute a contract, such as this court is in the habit of enforcing every day. The defendant says the letters are a mere matter of treaty; but if more than that, they do not set forth explicitly the terms of the dealing. I, however, think this is a distinct offer of 3,200*l.* for something which is as sufficiently clear and distinct. An objection which was urged, that Mr. Cronin had no authority to purchase the lease and pay a deposit, I think cannot be supported. He had authority to do so; and what is done by the agent is done by the principal, if within the scope of the instructions; which was so here. The particulars of sale show that both the principal and agent were perfectly aware of what interest the vendor possessed in the house, for both of them were at the sale by auction, and had the particulars of sale in their possession. Under these circumstances, the defendant cannot be allowed to say he was ignorant of the plaintiff's interest. I find that a sum of 3,200*l.* was offered, and it was undoubtedly unconditionally accepted; and the principles of the court are such, I think, as to bind the defendant to his offer. It is then said that the purchase by the defendant involves a purchase according to the conditions of sale; but I am of a totally different opinion. In the case of *Ogilvie v. Foljambe*, the purchaser had undoubtedly been to the auction; and although he did not then purchase of the auctioneer, yet he afterwards went to him and offered to treat with him or with his principal, which was exactly the same thing as, and in fact was, treating to purchase upon the conditions of sale. The contract was concluded upon those conditions of sale. In this case there is nothing more in it than the fact that the purchaser knew that the property had been put up for sale upon certain terms and conditions; and if that fact were sufficient to incorporate it into the treaty for purchase, it would make it impossible to sell property without particularly stating in the conditions of sale what time would be sufficient to prevent such incorporation. This is a contract, not through the auctioneer, but through other persons. If the defendant had said, "I am willing to take the property upon the conditions stated at the sale," some ground might have been shown for the argument. As to the expression "to come and draw the agreements," I think it merely meant to sign the con-

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tract and conditions of sale and purchase, and nothing more. I am, therefore, of opinion that this was a contract for the purchase of The Berkeley Arms, John Street, and not a treaty to purchase. If the defendant has not accepted the title, there must be the ordinary reference for the purpose of making one. Decree specific performance for the purchase of the house known as "The Berkeley Arms," John Street, Berkeley Square, with costs up to the hearing, so far as increased by a resistance to the title

NEATHWAY v. REED.¹

January 20, 1853.

Will, Construction of—"Surviving Children"—Practice—Appeal—Claim.

A testatrix, by her will, bequeathed "to my sister C. N.'s surviving children 30*l.* each," and subsequently proceeded as follows:—"I give and bequeathe unto my sister, C. N., the interest of my funded property for and during her natural life, and after her decease such property to be equally divided between her surviving children." One of C. N.'s children, who survived the testatrix, died in C. N.'s lifetime:—

Held, that "surviving children," in the second gift, meant children surviving C. N., although in the first gift it meant surviving the testatrix.

Upon an appeal from the whole order made on a "claim," the plaintiff begins.

ELIZABETH LYNCH, by her will, dated the 12th June, 1828, after making certain specific and pecuniary legacies, amongst the latter of which was the following, "and to my sister Catharine Neathway's surviving children 30*l.* each," proceeded as follows:—"I give and bequeathe unto my sister, Catharine Neathway, the interest of my funded property (whatsoever may be remaining after the legacies are paid) for and during her natural life, and after her decease, such property to be equally divided between her surviving children. It is also my desire that the money which will be derived from the funds at my decease, by the will of my late husband, John Lynch, with the money I may have at the savings bank at Southampton, should be first used in paying the before-mentioned legacies, and which moneys my executors are hereby authorized and empowered to take for the purpose; and if those moneys should not be sufficient to do so, then they are to sell out from the 3*l.* per cent. consols enough to defray that expense; the remainder then left in the 3*l.* per cent. consols to be made use of to my sister, Catharine Neathway, and to her surviving children, as before-mentioned." The testatrix died shortly after the date of the will, at which time her sister, Catharine Neathway had five children living; one of them died in the lifetime of Catha-

¹ 17 Jur. 169.

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rine Neathway. Catharine Neathway received, during her lifetime, all the interest of the residuary estate of the testatrix, and died on the 4th July, 1845, leaving four children her surviving. The question was, whether the representative of the child who died in the lifetime of the tenant for life was entitled to a share of the fund. Stuart, V. C., decided that he was not, and that the plaintiff, who was one of the four surviving children of Catharine Neathway, was entitled to one fourth of the fund. This was an appeal from that decision. The order was made upon "claim." A question was now raised by

Elmsley, for the appellant, as to which side had the right to begin.

KNIGHT BRUCE, L. J. We decided this very point on a previous occasion.

LORD CHANCELLOR, (Lord Cranworth.) That very point was decided by Knight Bruce, L. J., and myself, when lord justice, namely, that where it was an appeal from the whole order made on a claim, the plaintiff, by analogy to the parties upon an appeal in a cause, should begin. This is not properly a motion, it is an appeal cause.

Cairns, for the plaintiff. The simple question is, whether the words, "and after her decease, such property to be equally divided between her surviving children," mean surviving at the death of the testatrix, or at the death of the tenant for life.

[KNIGHT BRUCE, L. J. Are not the words almost identical with the words in *Cripps v. Wolcott*, 4 Mad. 11.]

The only possible ground for contending that these words point to the death of the testatrix, are the words in the first part of the will, "and to my sister Catharine Neathway's surviving children, 30*l.* each."

KNIGHT BRUCE, L. J. Had Mrs. Neathway lost any child at the date of the will? (This did not appear.) If she had had no other children, then the "surviving children" in the first instance, would mean surviving at the death of the testatrix; but if she had had a child that died before the date of the will, then the expression might mean the children living at that very moment.]

I submit that this gift of the legacies does not affect the construction which is to be put upon the latter gift. "Surviving" must be construed relatively; and in the absence of any thing to the contrary, the court applies it to the period of division or distribution of the particular subject-matter; so the period of distribution, as to the first gift, would be the death of the testatrix, and that of the second, the death of the tenant for life; and I submit there is no inconsistency in this.

Elmsley and *Younge*, for the appeal. The real question is, whether the gift to the children of the tenant for life vested at the death of the testatrix, in which case the plaintiff would take a fifth only, or at the death of the tenant for life. The Vice-Chancellor decided that the question was with respect to what time a meaning was to be put

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upon the word "surviving," and that that was when the fund was to be distributed. We submit that the testatrix has herself put a meaning upon the word "surviving," where it occurred in the gift of the 30*l.* legacy, which is inconsistent with the Vice-Chancellor's decision, and that the vesting took place at the death of the testatrix. It is a clear rule of law, that, where a definite meaning has been put upon words by a testator, that meaning is to be carried out through the whole will. We submit that the gift of this fund vested in the five children at the death of the testatrix. [On the point as to vesting they cited 1 Jarm. Wills, 763 — "But even though there be no other gift than the direction to pay or distribute in *future*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question." They cited also *Leeming v. Sherratt*, 2 Hare, 14.]

Cairnes, in reply, referred to *Taylor v. Beverly*, 1 Coll. 108.

LORD CHANCELLOR, (Lord Cranworth.) I think that the judgment of the Vice-Chancellor was perfectly right. The question as to what is meant by the term "surviving children" is often one of considerable difficulty, the phrase being often used by a testator without himself knowing what it means. In such cases we must resort back to the rules of construction to assist us in determining its meaning. Originally there was a leaning on the part of the courts to hold that "surviving" meant at the moment at which the will begins to speak, namely, the death of the testator; this was to carry out the rule in favor of vesting. But I think that the modern leaning of the courts has been to say, that the real test ought to be to look to the whole of the instrument, and see what really was intended. In my opinion it is a very safe rule to say, that when a testator gives property to a person for life, and after his death to his "surviving children," the meaning of that must be, the children that survive when the interest that was given to the tenant for life becomes exhausted by the death of that party. If there was nothing in this case but the gift of "my funded property to Catharine Neathway for and during her natural life, and after her decease such property to be equally divided between her surviving children," she having had five children, but only four at her death, these four would be entitled. But then it is said — admitting that such would in that case be the rule which would govern this case, there is something in this case to take it out of that rule, namely, that there were gifts of legacies of 30*l.* each to the "surviving children" of Catharine Neathway, not depending upon the life of Catharine Neathway, and therefore that the testatrix had herself given a meaning to "surviving children," which was, surviving at the death of the testatrix; and it was contended that the phrase must have the same meaning in the subsequent part of the will. I cannot accede to that argument. I think the context may show a very different meaning in the other part of the will; and that in the present case it does so.

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KNIGHT BRUCE, L. J. The gift in question is in these words:— [His lordship read the words.] Now, unless there be an explanatory context, that must be taken to mean the children who may happen to be living at the death of the survivor of Catharine Neathway and the testatrix, which survivor was Catharine Neathway. The argument, however, is, that there is an explanatory context, which is found to show that the word "surviving" is not used in the ordinary sense, but in a particular and descriptive sense, excluding the ordinary interpretation; and that argument is plausible, for the testatrix begins her will thus:— [His lordship read the earlier passage.] Now, it would be favorable to Mr. Elmsley's argument if, before the date of the will, Catharine Neathway had lost a child; that would explain at once, if it required an explanation, the use of so singular a word in that place; and I will assume, for the purpose of the argument, the fact to have been so; and so assuming, although most certainly it adds to the plausibility of the argument, yet it leaves it in my mind a matter of very considerable doubt—too doubtful to agree to disturb the decision of the court below.

TURNER, L. J. My opinion in this case entirely coincides with that expressed by the Lord Chancellor. [His lordship then read the terms of both gifts.] Now, the argument of the appellant as to the gift in remainder is, that the term "surviving children," having obtained a meaning in the first gift, must receive the same meaning in the second gift. Now, the reason why the phrase in the first clause must receive the construction of "surviving at the death of the testatrix" is, because there is no other period to which the term "surviving" could apply. But the same observation does not apply to the second clause; there are two periods to which the word could there apply—either children surviving the testatrix, or children surviving the tenant for life—and the question is, to which of those periods it applies. Now, it is an established rule, that, if possible, some effect must be given to every word of the will. Now, if the gift had been to Catharine Neathway for life, and after her decease to "her children," it would have given it to all her children. But I think that some effect must be given to the word "surviving," and that the proper effect is "surviving Catharine Neathway." In this opinion I am confirmed by the case of *Wordsworth v. Wood*, 1 H. L. C. 129.

Appeal dismissed, with costs.

Freer v. Hesse.

FREER v. HESSE.¹

March 3 and 4, 1853.

Registration of Judgment — Satisfied Term a Protection — Compensation — Costs.

If a judgment be not re-registered within five years after its first registration, as against a purchaser with notice of a re-registration made a little more than five years after the original registration, but less than five years before the execution of the conveyance to him, it is void under the provisions of the statute 2 & 3 Vict. c. 11, s. 4.

A satisfied term, assigned in trust for a purchaser for value, without notice of a judgment before the 31st December, 1845, although extinguished on that day by the 8 & 9 Vict. c. 112, is, by the 1st section of that act, a protection to a subsequent purchaser from him, without any fresh declaration of trust or assignment in favor of such subsequent purchaser.

A defect in the title to a small piece of land, over which lay the approach to a house and other land, the main subject of a purchase, was a matter for compensation, where the contract contained a condition for compensation, if any mistake or omission should be discovered in the description of the property. In a suit for specific performance, by a vendor against a purchaser, the Master reported that a good title was first shown, pending the reference to him, except as to a small portion, which the court considered a subject of compensation. Costs were given to the defendant up to the date of amending the bill, and to the plaintiff afterwards.

THIS was a suit by the vendor of certain property, against the purchaser, for specific performance of his contract. The vendor was a mortgagee, with a power of sale, under an indenture of mortgage dated the 30th January, 1844. The property was in the first instance put up for sale by auction under certain printed conditions; and subsequently the sale not having taken place, on the 10th December, 1846, it was sold by private agreement, subject to the same conditions of sale, for the sum of 1,150*l*. The property was described as a dwelling-house and outbuildings, with land adjoining, containing 24a. Or. 27p., more or less, being freehold, except about twenty-six perches of copyhold. There was the usual conditions for compensation, "if any mistake or omission should be discovered in the description of the property." On the 25th December, 1846, the purchaser was let into possession, but the purchase-money was not paid. The defendant refused to complete his contract, on the ground that the plaintiff had not shown a good title, by reason of two judgments, which were registered respectively on the 6th May and the 25th November, 1843, against the mortgagor. It appeared, however, that the mortgagee had no notice of these judgments, and that by the mortgage deed of the 30th January, 1844, a satisfied term of 1,000 years in the freehold parts of the said premises, which had been created in 1818, was assigned to a trustee for the mortgagee for the better securing his mortgage debt and interest, and subject thereto, in trust to attend the inheritance. The bill in this suit was filed on the 23d

¹ 17 Jur. 179.

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March, 1848, and amended on the 10th December, in the same year. The cause came on for hearing on the 24th May, 1850, when a decree was made of that date for specific performance, with the usual reference as to title, having regard to the terms of the contract. By his report, dated the 24th May, 1852, the Master found that a good title could be made to all the estate, except such part as was copyhold, comprising about three roods and twenty-nine perches, and that such good title was first shown on the 7th May, 1852. The report was not excepted to. Pending the reference, on the 9th November, 1850, the two judgments were re-registered, and notice thereof was then given to the defendant. The cause now came on for hearing on further directions; and the objections now made by the defendant were, first, that the two judgments were a charge upon the inheritance as against the mortgagee and all claiming under him, and that the attendant term was not a protection to him within the provisions of the 8 & 9 Vict. c. 112; and, secondly, that the defect of title to the copyholds could not be the subject of compensation, because that part of the property was essential to the enjoyment of the rest, as the approach to the house lay over it.

Malins, Q. C., and *Hallett*, for the plaintiff, said that the vendor was ready to make compensation in respect of the copyhold.

H. Stevens, (Bacon, Q. C., with him,) for the defendant, referred to the 4th section of 2 & 3 Vict. c. 11, which enacts that all judgments registered under the provisions of the 1 & 2 Vict. c. 110, "shall, after the expiration of five years from the date of the entry thereof be null and void, against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the execution of the conveyance." He argued that this provision was satisfied by the registration of a judgment within five years before the conveyance to a purchaser, although somewhat more than five years had elapsed between such registration and the first registration of such judgment — the object of the statute being to limit the period of search, and not to create a new period of limitation to bar the judgment debt. Then, if the judgments were good against the defendant, the term assigned in trust for the mortgagee was no protection to the defendant as to the copyholds, nor even as to the freehold property; for the act 8 & 9 Vict. c. 112, which extinguished terms satisfied and attendant on the 31st December, 1845, preserved the protection of such terms for the benefit of the person for whom they were made attendant, "by express declaration," as in this case, for the mortgagee, but did not give such protection to a purchaser from him as a further assignment of the term would afford; and no further assignment could be made for the defendant's benefit, the term having ceased to exist. (*Sugd. V. & P. 777, 14th ed.*¹) He argued that the

¹ See *Sugden's Essay on the Real Property Statutes*, p. 288, pl. 4, where it is said ●

Freer v. Hesse.

defect in the title to the copyholds could not be a subject of compensation, as this part of the property was essential to the enjoyment of the rest; and the condition as to compensation did not refer to a defect of title, but of description only. He submitted, therefore, that the bill must be dismissed, and with costs.

Malins, Q. C., in reply, argued that judgments were void under the 2 & 3 Vict. c. 11, against purchasers, unless re-registered within five years after the first registration; and, therefore, at the time when this bill was amended, the two judgments were absolutely void as against the defendant in this case. But if not, the term of 1000 years was a protection to the defendant against these judgments; for it was assigned on the 30th January, 1844, to a trustee for the vendor, and to attend the inheritance; and the purchaser was entitled to the same protection which it afforded to the vendor. As to the copyholds, the plaintiff was ready to make a proper compensation. As to costs, the defect concerning the copyholds, which was the only one mentioned in the Master's report, was not the occasion of the suit; and it was not material that a good title was first shown pending the proceedings before the Master. *Scoones v. Morrell*, 1 Beav. 241. *Long v. Collier*, 4 Russ. 269, was also referred to.

STUART, V. C., said that he had no doubt that the title was good, his opinion being in favor of the plaintiff upon all the points which had been argued. He thought that the objection as to the copyholds was a proper subject of compensation. With respect to the construction of the 2 & 3 Vict. c. 11, his Honor observed, that upon the whole scope of that statute, although the language of it was vague, and admitted of the argument which had been urged on the defendant's part, yet he thought that it would be highly dangerous to accede to that argument; and to mark his sense of the construction of that act, though he would give the defendant his costs up to the date of the amended bill, his Honor gave the plaintiff costs subsequent to that date. The purchase-money must be paid, with interest at 5*l.* per cent. according to the contract, up to the execution of a conveyance to the purchaser.

that this act "gives not such protection as a further assignment of 'the term' for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist, but had not been assigned or dealt with after the 31st December, 1845." But no "such term can now be kept on foot by assignment." *Doe v. Price*, 16 M. & W. 603.

THE ATTORNEY-GENERAL v. HENDERSON.¹

February 21 and 22, 1853.

Practice — Swearing of Answer.

Where the jurat of one defendant to a joint and several answer has been accidentally cancelled, the answer must be resworn by such defendant; but the jurat is to be in the old form, namely, as to the truth of the matters stated which are within the knowledge of the defendant, and as to his belief of the truth of the other matters not within his own knowledge.

SELWYN, on behalf of the defendant, the Dean of Norwich, made an application to the court. The answer, joint and several, of the dean and certain co-defendants, had been duly sworn by the dean according to the old form, namely, that the matters therein stated, so far as they related to his own acts, &c., were true, and so far as they related to the acts, &c., of other persons, were by him, the dean, believed to be true. On taking the answer into the country to be sworn by the other defendants, there was some informality in their jurats, and in making the necessary corrections in theirs, the jurat of the dean was partially erased. The clerk of the records and writs refused to file the answer unless it were resworn, and resworn too, not according to the original form, but absolutely to the truth of the matters therein stated, indiscriminately; objecting to the words of the 21st section of the late act for the improvement of equity jurisdiction, which provides that the practice of issuing commissions to take answers, &c., shall be abolished, and that "any such answer, &c., may be filed without requiring any further or other formality than is required in the swearing and filing of an affidavit." The application was, that the answer should be directed to be received in its present state; but that, at all events, if a fresh jurat were necessary, the dean might not be required to pledge his oath, to matters with which he was personally unacquainted. The words of this statute it was observed, were permissive merely, not imperative; they went merely to the formality attending the execution of the jurat, not to its contents; if, indeed, they were not intended merely to be confined to the formalities attending the mechanical operation of receiving and filing answers, &c.

Wood, V. C., appeared somewhat at a loss to understand the grounds for the view taken in the office, and directed the case to be mentioned the next day, and that the officer should be in attendance.

February 22. The officer having presented himself in court, after some conversation, his Honor directed the jurat to be re-executed, but in the old form.

¹ 17 Jur. 205.

The Grand Trunk Peterborough Railway v. Brodie.

THE GRAND TRUNK PETERBOROUGH RAILWAY v. BRODIE.¹

March 4, 1853.

Winding-up Acts — Suit by Official Manager — Costs.

A suit, undertaken by some shareholders in a railway company, on behalf of themselves and all others, against some of the directors, had been directed by the Master, to whom the winding up was referred, to be continued and prosecuted by the official manager. At the hearing, it was dismissed by Sir G. J. Turner, V. C., with costs, to be paid by the official manager. A subsequent application was made to have the order rectified, so as to make the costs payable by the official manager personally. Upon that application the order made at the hearing was varied by inserting "Mr. T." (the name of the official manager,) between the words in the original order, "costs to be paid by," and "the official manager:" —

Held, that the insertion of the name in this manner, did not render the official manager liable to pay costs, otherwise than in his official capacity; and a subpoena and attachment, which had been issued against him on his neglecting to pay such costs personally, were respectively discharged, and quashed accordingly, but without costs.

For a full report of this case at the hearing, see 16 Jur. 678, s. c. 13 Eng. Rep. 1, where Sir G. J. Turner, V. C., had directed the bill to be dismissed with costs, to be paid wholly by the official manager. The defendants accordingly had demanded payment from him individually, and had afterwards obtained leave to amend the order by inserting the name of Mr. Turquand, the official manager; so that the order for payment of costs stood thus — "To be paid by Mr. Turquand, the official manager of the said company." The costs being still unpaid, the defendants had proceeded by subpoena and attachment against Mr. Turquand personally. The present motion was by Mr. Turquand to set aside these proceedings, contending that the order was not in terms such as to bind him otherwise than in his official capacity.

Daniel and Little, for the motion. The official manager acted under the direction of the Master, who, if he had thought fit, might have directed the suit to be wound up, or compromised on any terms. Mr. Turquand is, therefore, on the merits, protected by the 59th section of the act, which is in these words — "that no judgment, decree, or order, to be obtained or entered up against the official manager of any company, as representing the same, shall affect or be executed against the person or the property of the party who may for the time being be such official manager, otherwise than as a contributory; and that every official manager shall always be fully reimbursed and indemnified out of the assets of the company, or out of the credits thereof, and, if necessary, by calls to be made on the contributories for all losses, costs, charges, damages, and expenses, without deduction, save and except such, if any, as shall have been unduly or improperly sustained or incurred by any such official manager." And on the words of the order, beyond which it is improper to travel on

¹ 17 Jur. 205; 22 Law J. Rep. (N. S.) Chanc. 514.

the present occasion, no effect can be given to those words "official manager," which are as much part of the order as any other matter contained in it, unless Mr. Turquand be allowed to claim the immunities of his office. It is very doubtful whether the court could in any case visit the official manager with costs in his individual capacity, looking at sect. 59, above quoted.

Wood, V. C. I have no doubt as to the jurisdiction, and no doubt that it was the intention of the court to exercise its power of visiting Mr. Turquand with costs, personally, on the present occasion. The question is, whether this intention is what appears on the language of the order. The defendants may have their costs against Mr. Turquand personally, or against the contributories through him, but not against both. I wish the defendants' counsel to direct their remarks solely to the effect of the words introduced after Mr. Turquand's name in the order made.

Selwyn, for the defendant Brodie, and *Kenyon*, for the defendants Brown and Carter, contended that the words "official manager" so left were left without the attention of the court having been duly directed to the possible effect of retaining those words.

[Wood, V. C. Is it alleged that the words "official manager" were allowed to remain through inadvertence? That might afford ground for an application to rectify the order by striking out the words complained of. Until struck out, it must be taken that the court designedly allowed them to remain.]

No notice was taken one way or the other. At all events, there must have been some intention in inserting the name of Mr. Turquand on a special application. That is a more important act than the mere passive neglect to strike out certain words of description. And pointing out a man by name is more emphatic than a general description, which, after all, would apply equally, whatever were the intention of the court as to costs. If it had been intended that Mr. Turquand should only pay in his official capacity, the word "as" would have been inserted thus — "as official manager," or "as representing the company," or in some such manner. The words in the order are mere words of personal description, identifying this Mr. Turquand from all other Mr. Turquands.

Wood, V. C. The question before me is, whether it appears less the intention that the official manager, in his official character, is meant, because the name of Mr. Turquand is inserted. It would have been as well that I should have known the form of orders or judgments at common law against official managers. It is perfectly clear that I cannot attend in any way to what has been the conduct of the parties, nor to what was the intention of the court in making the order, further than as that intention is to be gathered from the words of the order made. From the report of the judgment, it appears that the court intended that Mr. Turquand should pay the costs personally. The original order directed them to be paid by the offi-

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cial manager of the company. There was a subsequent application to insert Mr. Turquand's name, that he might pay the costs personally. The court, upon that application, directed the insertion of Mr. Turquand's name. But the words "official manager of the company" were allowed to remain. I am told that that was through inadvertence, the attention of the court not having been turned to the inference that might be drawn from the presence of those words. But there the words are. Can I reject them as having no effect whatever — as being mere surplusage? If Mr. Turquand had been described by name alone, that would have been very strong to show that he was intended personally to bear the costs. But having to deal with these other words, the question is, what sense am I to put upon them? And for that purpose I must look to the 55th and 59th sections of the act. This is an order pronounced by a court of equity against an official manager *eo nomine*; it may therefore be made effective against all or any of the contributories of the company. Perhaps this is against the intention of the court. But so stands the order. No allegation of the intention of the court can prevent the order from being carried into effect, except that it may induce the court on an application to alter or vary it, to do so. I regret being compelled to come to this conclusion, because I can see, from the report of the judgment, what the intention of the court was. I do not think, however, that the words of the order go beyond the 56th section, or take the case, as regards the official manager's liability to pay the costs, out of the rule in that section. I must therefore make the order moved for, namely, to set aside the subpoena, and stay all further proceedings thereon as against Mr. Turquand personally. But I do not think this is a case for costs. I make no order as to the costs of this motion.

THE ATTORNEY-GENERAL v. SALKELD and another, Churchwardens of the Parish of St. Giles, in the County of Durham.¹

March 1, 1853.

Information — Churchwardens sued by Name, and not by Office.

An information was filed against A. and B. by name, they being churchwardens of a certain parish; the object of the information was for inquiries into the application of the rents and profits of the property of the parish, and for a scheme for the future management of the estate. The court made the order, notwithstanding that the churchwardens were not parties in their official character.

THIS information was filed on the 26th August, 1852, against Mr Salkeld and another by name, but who actually held the office of churchwardens of the parish of St. Giles, in the county of Durham;

¹ 17 Jur. 178.

and it stated that certain property, consisting of about nineteen acres, in houses, gardens, and allotments, situate in the said parish, and known as the Gillegate Church property, was held by the churchwardens for the time being of that parish for certain charitable purposes: that the origin of the charity was not known: that leases had been made, and that the rents derived from the same had been applied in repairing and restoring the church of that parish. The estimated value of the property was 350*l.*, and the information prayed that an account might be taken of the extent and value of the property, and for an inquiry as to the validity of the existing leases, and as to whether any and what proceedings should be taken with respect to such leases, and the best mode of leasing and dealing with the said property in future; also for a scheme for the future management and application of the rents and profits of the said property, and that fit and proper persons might be appointed trustees of the same.

Terrell appeared for the relator.

Lloyd and *Faber*, for the defendants, submitted that the information was defective, in consequence of the churchwardens having been made defendants personally, and not in their official character. Since the filing of the information, Mr. Salkeld and his colleague had gone out of office; and although the former had been re-elected, the party who had been nominated in the room of the latter would not sign the necessary declaration before taking upon himself the duties of the office. They cited the following cases in support:—*Doe d. Higgs and others v. Terry*, 4 Ad. & El. 274; *Doe d. Hobbs and others v. Cockell*, Id. 478; *Doe d. Jackson and others v. Hiley*, 10 B. & Cr. 885; *Ex parte Ammesley*, 2 Y. & C. 350; *Alderman v. Neate*, 4 M. & W. 704; *Allason and others v. Stark*, 8 Ad. & El. 255; *The Attorney-General v. Lewin*, 8 Sim. 366; *In re The Paddington Charities*, Id. 629; and *Rumball Gough v. Munt*, 8 Q. B. 382; and contended, that as soon as a man went out of office an abatement took place, and that the most regular course would have been to make the parties defendants in their official name, under the powers given by the 59 Geo. 3, c. 12, s. 17.

[ROMILLY, M. R. Has that ever been done? I do not know of such a case. The parish, I suppose, are the practical defendants here.]

Terrell. I do not remember an instance of the kind referred to. The act cited makes the churchwardens a corporation only for a certain purpose; certainly not for the purpose of suing and being sued. Before the 59 Geo. 3, churchwardens were not a corporation at all.

Faber. In the case of *The Churchwardens and others of St. Nicholas, Deptford v. Sketchley*, 8 Q. B. 304, there seems to have been some defect in the proceedings in consequence.

ROMILLY, M. R. I think the best course will be to direct the decree

In re Lane.

to be made in the terms proposed. It is desirable that the churchwardens and overseers should be served with notice of all proceedings in the suit from time to time, and when that has been done, they must agree amongst themselves as to which of them are to attend before the Master by one set of solicitors. The parish will, I suppose, continue to prosecute the suit in the same way as it has heretofore done.

*In re LANE.*¹

March 12, 1853.

Infant — Under Powers of Maintenance and Education, Part of the Capital of Infant's Share applied for Payment of Debts incurred for his Benefit and Education.

Under a marriage settlement, stock was vested in trustees, in trust to pay the interest and dividends to the wife for life, remainder to the husband for life, with a power to them and the survivor to appoint the principal among the children of the marriage. The wife died, and the husband appointed a third part thereof absolutely and at once, in trust for an infant child, payment to be postponed till twenty-one. The court, on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred, and to be incurred for his education as a cadet, and his advancement in India, granted the prayer of the petition, so far as related to payment of part of the expenses incurred, and as to the expenses of education and residence as a cadet at Addiscombe, and ordered the rest of the petition to stand over.

This was a petition presented by Horatio Powys Lane, an infant, and his father, Samuel Lane, and it stated that a settlement was made in the year 1835, on the marriage of the infant petitioner's parents, by which certain moneys to arise from the sale of real estate were assigned to trustees, in trust for investment, and to pay the interest and dividends to the infant petitioner's father and mother for life, in succession, with a power to them, or the survivor of them, to appoint the principal to or among the children of the marriage, or any one or more of them; but in default thereof, in trust for all the children equally. The petition stated that the settlement also contained a clause enabling the trustees, after the death of the father and mother, to apply the interest and dividends of each child's expectant share for his education and maintenance, and also to apply a part, not exceeding one half, of each expectant share, for the preferment and advancement of each child: that the trustees had received certain trust moneys, which were represented by the sum of 2,660*l.* 16*s.* 3*d.*, 3*l.* per cent. consols, and the sum of 420*l.* 0*s.* 6*d.*, 3*l.* per cent. reduced annuities, and which were standing in their names: that the wife was dead; and that by a deed-poll, dated the 8th March, 1853, the petitioner, Samuel Lane, appointed a third part of the before-mentioned sums of stock in trust for the infant petitioner, absolutely and immediately,

¹ 17 Jur. 219.

The Dean and Chapter of Ely v. Edwards.

but that payment was postponed till he should attain the age of twenty-one years: that in order to prepare the infant petitioner for a cadetship in the East India Company's service, expenses amounting to 209*l.* 9*s.* 10*d.* had been paid, and a debt of 40*l.* incurred for his education; and that to provide for his residence at Addiscombe College the sum of 125*l.* per annum, for two years, would be required, and in addition thereto the further sum of 350*l.* for an outfit to India, on the infant petitioner obtaining his appointment in India: that the sum of 100*l.* had been borrowed by the father for the purpose of defraying some of the expenses incurred. And the petitioners prayed that an order might be made authorizing the trustees to sell so much of the infant petitioner's share of the sums of 2,660*l.* 16*s.* 3*d.*, 3*l.* per cent. consols, and 420*l.* 0*s.* 6*d.*, 3*l.* per cent. reduced annuities, as would produce the sum of 849*l.* 9*s.* 10*d.*, being the aggregate amount of the above-mentioned sums expended on his behalf, and which would be required for his future provision.

W. P. Murray, for the petitioners, cited *Clay v. Pennington*, 8 Sim. 359.

ROMILLY, M. R., doubted whether he could make the order without first having the money brought into court; but the case of *Ex parte Hayes*, (18 L. J., Ch., 441) having been referred to, his Honor ordered that the trustees should be at liberty to sell so much of the one third part or share of the sums of stock mentioned in the petition as would be required to repay the sum of 100*l.* to the father which he had borrowed, and the sum of 40*l.* debt incurred for education; and also that they should be at liberty to expend the sum of 125*l.* annually, for two years, for the maintenance and education of the infant petitioner during his residence at Addiscombe College, and to pay the costs of the application out of the same fund; and he ordered the rest of the petition to stand over.

THE DEAN AND CHAPTER OF ELY v. EDWARDS and others.¹

March 11, and 15, 1853.

Practice — 15 & 16 Vict. c. 86.

Appointment by the court of a person, under the 44th section of the act, to represent the estate of a deceased defendant, who was a tenant for life of tithes.

This was an application under the 44th section of the 15 & 16 Vict. c. 86, that an order might be made to appoint a person to

¹ 17 Jur. 219.

The Attorney-General v. The Donnington Hospital.

represent the estate of Mr. Layford, one of the defendants in the suit, who was tenant for life of tithes belonging to the plaintiffs, and who had died intestate. There was no legal personal representative of the intestate.

Lloyd and Fleming, for the application.

March 15. ROMILLY, M. R., said this matter was lately before him, and it had merely stood over in order that he might consider the point, and also consult some of the other branches of the court. He had since done so, and the judges whom he had consulted concurred in the opinion which he had expressed when the application was made, and which was, that the widow of Mr. Layford should be served with notice, and should be ordered to appear and represent her deceased husband's estate and effects for all the purposes of the suit.

Ordered accordingly.

THE ATTORNEY-GENERAL v. THE DONNINGTON HOSPITAL.¹

March 12, 1853.

Practice — Form of Jurat.

BUSK applied for leave to file an answer which the officer at the record and writ clerk's office declined to receive, on the ground of informality in the jurat. The answer had been sworn in the usual way, when an error in a schedule was discovered. Part of the schedule, and also the original jurat were then cancelled by cross lines, and a new jurat added, commencing "resworn, &c." The officer objected that the jurat either ought to be "sworn, &c.," or that the original jurat ought not to have been cancelled.

WOOD, V. C., directed the answer to be received, observing that the whole of the original jurat was perfectly legible, and the whole transaction, therefore, manifest on the face of the document.

¹ 17 Jur. 206.

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MURRAY v. BOGUE.¹

December 9, 11, and 12, 1852, and January 13, 1853.

Copyright — Registration.

Where the first edition of a book had been published before the Copyright Act was passed, but subsequent editions had not been registered:—

Held, that such parts of the book as were in the first edition were protected, but that no suit could be maintained as to the parts introduced in the subsequent editions.

A charge of piracy of an English book cannot be rebutted by showing that the part complained of was copied from a foreign book, which foreign book appeared to be copied from the English book.

M. published a guide book, partly original, partly compiled. W., who had never been in the country described, was employed by B. to write a guide book to the same country. W. compiled his book partly from foreign works and partly from original manuscript, and appeared to have used M.'s work, but not unfairly:—

Held, that B. could not be restrained from publishing the guide book of W.

THIS was a motion to restrain the defendant, David Bogue, from selling or disposing of any copies of his work, called "Switzerland and Savoy," and from printing, publishing, selling, or disposing of any other book containing any article, matter, or thing copied or taken from the plaintiff's work, called "A Handbook for Travellers in Switzerland and the Alps of Savoy and Piedmont." The plaintiff's bill, and the affidavits in support of it, stated, that previously to the year 1838, the plaintiff wrote and composed a book under the title above-mentioned, and such book was written and composed by the plaintiff principally from his personal observation and experience, obtained in the course of extensive and carefully performed journeys in and through the aforesaid countries; and at the same time the plaintiff, by the accounts of other travellers and authors, and comparing their accounts with the result of his own observation, was enabled to add to the said work much useful information: that the plaintiff's book had since enjoyed an extensive sale, and subsequent editions were printed and published in 1842, 1846, 1851, and 1852: that the plaintiff's work was one of a series of Guides or Handbooks published by him: that some time ago the defendant announced a series of Guide Books, of which he had published one volume; and the second volume being the book called "Switzerland and Savoy," was published in August, 1852: that parts of the work published by the defendant were pirated and copied from the Handbook, and in many respects an unfair use had been made of the Handbook. In November, 1852, the plaintiff's solicitor wrote to the defendant, and stated his intention of applying for an injunction: and the bill was filed on the 24th November. The affidavits filed in opposition stated that various inquiries having been made for a Guide to the more frequented parts

¹ 17 Jur. 219; 1 Drewry, 353; 22 Law J. Rep. (N. S.) Chanc. 457.

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of Europe, of a more convenient size and more economical price than that published by the plaintiff, the defendant made arrangements, and engaged the services of Frederick Knight Hunt to write and compile a book, or series of books, one of which was "Switzerland and Savoy;" that the defendant strongly impressed upon Hunt the necessity of carefully abstaining from making any extracts from the plaintiff's Handbook; that Hunt employed Thomas Walker to write and compile the work in question, and communicated to him the directions and instructions of the defendant, and at the same time furnished him with the manuscript notes of Hunt himself, made during two visits to Switzerland and Savoy: that Walker compiled the book from the following sources:—Hunt's manuscript notes, the manuscript notes of David Lloyd, Weiss's *Manuel du Voyageur*, and books by Zschokke, Müller, Berghans, &c., published before 1838, and later books, including an American work by Dr. Cheever, and a German work by Baedekker; and Walker most distinctly denied that he knowingly or willingly extracted or quoted from the plaintiff's book any part or portion whatever.

Bacon and Renshaw, for the plaintiff, contended that he was entitled to protection for the work in question. The statute regulating the law of copyright at the time of the registry of the first edition (1838) was the 54 Geo. 3, c. 156. The act at present in force is that of the 5. & 6 Vict. c. 45, the 24th section of which provides, that in case of there being no entry of a book in the book of registry of the Stationers' Company, in that case the proprietor should have no right to sue for infringement of his copyright. Now, it was contended that this act was altogether prospective, and that it was not the intention of the legislature to deprive publishers of any rights they previously possessed. This work, then, having been completely registered under the old law, it was unnecessary to register it again, as the statute merely contemplated works published after the passing of the act, and could have no operation on those which had fulfilled the obligations of the law which was in force at the time of their publication. Now, what were the circumstances under which the injunction was applied for? Mr. Murray was the owner of the copyright in a well known and valuable work. It was abundantly clear that the person employed by the defendant had made use of this work. The defendant did not attempt to deny the allegation in Mr. Murray's affidavit; he only stated that they had not extracted or quoted. But there was enough to show the court that even although they might not have done so, yet they had taken quite sufficient to give the plaintiff a right to claim protection from the court. Quantity in these cases was not the essential point. The defendant had no right to avail himself of Mr. Murray's labors, even in the slightest degree. It was manifest that the charge was not met, and that evasion was resorted to in order to mislead and delude the court. There was a remarkable resemblance between the two books, on which he relied. It was utterly impossible that the subject should have been treated in the same manner by mere accident. A strong point in

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his favor was, that out of 136 routes in Mr. Murray's book, Mr. Bogue had treated of thirty-four, and twenty-three out of them were identical with Mr. Murray's. Now, was it possible that so large a proportion as that could be the effect of mere accident? *Lewis v. Fullarton*, 2 Beav. 6, was a case similar to the present, and showed that copyright could exist where the arrangement of matter was new, as well as where the composition was strictly original. This is a peculiar case. The defendant here comes forward as the rival of the plaintiff, and should, therefore, not venture to copy or extract the smallest portion. The case depends on the copying of particular passages, but more on the general similarity. The defendant says he instructed Hunt, who had been in Switzerland, and Hunt says he employed Walker, who had never been there, and furnished Walker with a manuscript of his own, and a manuscript of Mr. Lloyd's. [The manuscript of Walker was produced in court, and appeared to be contained in one of the common metallic pocket-books; the manuscript of Lloyd was stated by the defendant to have been lost.] The defendant admits copying from Cheever and Baedekker, who both copied from Murray. There is a general similarity running through the book; besides which, the defendant has copied many passages with errors in them. (See the judgment.) *Lewis v. Fullarton*, 2 Beav. 6; *Bramwell v. Halcombe*, 3 My. & C. 183; *Dickens v. Lee*, 8 Jur. 183; *Gray v. Russell*, 1 Story, 111; *Emerson v. Davis*, 3 Story, 708; *Longman v. Winchester*, 16 Ves. 269; and *Campbell v. Scott*, 11 Sim. 31, were cited.

Craig and Reilly, for the defendant. There is a preliminary objection, that this book is not sufficiently registered. By the 5 & 6 Vict. c. 45, (which came into operation on the 1st July, 1842,) s. 24, there is no right to sue for infringement of copyright unless the work has been registered according to the provisions of that section. It was the duty of a publisher, on publishing a new edition of a work already registered, to register that new edition; otherwise the act deprived him of any remedy for violation of his copyright. The first edition was registered, but the subsequent were not, and were, therefore, as was contended, unprotected. If, indeed, the subsequent editions were in every respect the same with the one registered, then the act did not impose the duty of a fresh registration; but a new edition, with alterations, is a new book. Where can the limit be drawn if it is not? By the 6th section of the act, copies of every book, and of all subsequent editions, must be sent to the British Museum; showing that such republications, when there were additions or alterations, were to be looked upon as new works, otherwise it would have been quite enough to have sent the first edition of a work. It was quite clear, then, that the plaintiff had no *locus standi* in respect of the third edition, (1846.) But even supposing he had established his right to protection, had he succeeded in proving the fact of piracy? It was contended that he had not. He had confused the evidence of piracy, in bringing forward the instances which he had, with piracy itself. The defendant could not be prevented from making a fair use of Mr.

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Murray's book: he was only bound to confine himself within certain limits, and to take care that he did not injure the plaintiff's work. The real state of the case was this — Mr. Bogue, having been often asked for different guide books, had directed a literary gentleman (Mr. Hunt) to write one on Switzerland, he having been there, and kept memoranda of his travels. Mr. Hunt, in conjunction with another gentleman named Walker, in accordance with these instructions, having been enjoined not to come into collision with the plaintiff's Handbook, proceeded to write the work in question. In doing this, they had, in addition to their own note-book, availed themselves of different books of travel, such as Baedekker's, and one by Dr. Cheever; but they had sedulously abstained from making any piratical or unfair use of Mr. Murray's book. The true inquiry, as laid down by both Lords Cottenham and Eldon, was, whether the defendant had fairly employed himself in writing an original work, not whether the same phrases in some few instances were made use of. Mr. Murray's counsel have no doubt produced instances of words and phrases in both works being identically the same; but these were few and far between, and did not materially trench on the plaintiff's work. In *Wilkins v. Aiken*, 17 Ves. 422, a whole sentence had been copied, and it had been held to be quite fair. Then in *Carey v. Longman*, 1 East, 358, Lord Kenyon said that there could be no copyright in passages copied from other works. Now, a great deal of Mr. Murray's book had been taken from works from which the whole world might take. Lord Mansfield, in *Sayer v. Moore*, 1 East, 391, said that to constitute a piracy the transcript must be servile and literal. *Carey v. Kearsley*, 4 Esp. 168; *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Ves. 269; *Barfield v. Nicholson*, 2 Sim. & S. 1; *Sweet v. Maugham*, 4 Jur. 456; 11 Sim. 51; *Sweet v. Cathor*, 11 Sim. 572; *Spottiswood v. Clerk*, 2 Ph. 157. All these cases recognized one principle — that the case established must be one of *mala fides*.

Bacon, in reply.

January 13. KINDERSLEY, V. C. This is a motion for an injunction to restrain the defendant, Mr. Bogue, from selling or disposing of a certain work he has published, which is alleged to be a piracy of the plaintiff's (Mr. Murray's) work, and from publishing any other work which may contain passages taken from the plaintiff's work. The defendant insisted, that in the first place, even supposing that the defendant's work was borrowed from the plaintiff's work, the plaintiff was not entitled to sue in respect of the infringement of his copyright, for want of due registration of the plaintiff's own work; and, secondly, that even if that were not an objection, in fact the defendant's work is no piracy of the plaintiff's. Now, with respect to the first point, the question with regard to the registration, it is necessary that I should take that first. Previously to the act of the 5 & 6 Vict. c. 45, which is the recent act that has made an alteration in the law of copyright, it was not necessary, to enable a plaintiff, the owner of a copyright,

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to sue another in respect of the infringement of that copyright, that there should have been any registration of the work at Stationers' Hall. Registration was required by the previous acts; but it was decided, that even where no registration had been effected, the party might still protect his copyright, either by action or suit. The act of the 5 & 6 Vict. c. 45, made an alteration in the law in that respect. Besides altering the duration of the copyright, it altered the law in this respect. By the 24th section it enacted, "that no proprietor of copyright in any book which shall be first published after the passing of this act, shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company of such book, pursuant to this act; provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of any infringement thereof as aforesaid." Then there is another proviso not bearing on the present question. So that, with respect to any book which shall be first published after the passing of that act, although the author has a copyright in the book, he cannot sue, either at law or in equity, in respect of an infringement of that copyright, unless that book has been registered at Stationers' Hall, pursuant to the act. But that applies only to books which shall be first published after the passing of the act; it does not in any way affect books first published before the passing of the act. Now, that act passed on the 1st July, 1842. The first edition of Mr. Murray's (the plaintiff's) Handbook for Switzerland was, according to the affidavits, published in 1838, long before the passing of that act of parliament. The second edition was published in the month of July, 1842, and the act passed on the 1st July, 1842; and I think I am bound to assume, and must assume, that that second edition was first published after the passing of the act. Of course the subsequent editions were posterior to the passing of the act. Now, what is the effect of this act of parliament with respect to these several editions of Mr. Murray's (the plaintiff's) book? The plaintiff's book, except so far as it was registered previously—that is, as the first edition was registered previously to the act of parliament—has not, with that exception, been registered at all. It has never been registered at Stationers' Hall subsequently to the passing of the act of the 5 & 6 Vict.

With regard to the first edition, as I have already said, the law, as it existed previously to the 5 & 6 Vict., did not require any registration in order to entitle the plaintiff to sue in respect of any infringement of the copyright of that first edition; nor has the 5 & 6 Vict., with regard to that edition, published antecedent to the passing of the act, made any alteration except, indeed, in this way—the act of the 5 & 6 Vict. repeals entirely the prior acts; and if that were all, it might be a question whether a party had any copyright in a book published previously to that act of parliament, because it has been held—although there was a great doubt about it at one time, and there was a contrary decision at one time—it has been held that there is no

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common-law right to the copy, as it is called, as it is entirely the creature of the statute. But although the 5 & 6 Vict. repealed the prior acts of parliament—the act of Anne and the two acts of Geo. 3—it re-enacted a copyright, and a better copyright—a copyright enduring for a longer period than under the prior acts. It gave to the author, or to the proprietor of the copyright, of any book published previously to the act, a certain copyright, the same, in fact, not less than forty-two years; but with respect to the obligation to register, it is confined to works which shall be first published after the passing of the act. It left any work, which was first published previous to the passing of the act, unaffected with regard to any obligation to register at Stationers' Hall; so that, supposing Mr. Murray had published that first edition in 1838, and supposing no other edition had ever been published at all, and any one had infringed Mr. Murray's copyright in that first edition, he would clearly have a right now, although that book was not registered at all, notwithstanding the 5 & 6 Vict., to have sued, either at law or in equity, in respect of the infringement of that copyright, and his publishing another edition after the passing of the act, or before the passing of the act, does not in any way affect the copyright which he has in the first edition; but if he publishes, as he has done, a second edition, which is not a mere reprint of the former edition, but contains alterations and additions, *quoad* those alterations and additions, it is a new work; that is to say, in order to entitle him to sue, at law or in equity, in respect of the infringement of his copyright in that portion of the second edition which is new, and if that were the only part infringed upon, he must, before he can sue, have registered that edition at Stationers' Hall, in pursuance of the 24th section of the act.

Now, Mr. Murray, in his preface to his book, the second edition, repeats naturally enough the preface to the first edition, but he adds a note to it to this effect, in the second edition, and in all the subsequent editions—“The present edition has been very carefully revised and corrected, as far as possible, down to the present time. Some new routes have been added, and others have been re-written.” And then he refers to the work of Professor Forbes, and so on. Now, if this had occurred, that Mr. Murray, having in that second edition published in 1842, and the subsequent edition of 1846, and so on—if he had, as he has done, added any new routes or new matter, or altered the former work so as to introduce new matter, and make it in that respect a different work, although substantially the same work, still to that extent it was new, whether it had been great or small—if he wants to protect that portion thus introduced for the first time after the passing of the act, it appears to me that he is bound to register the work at Stationers' Hall before he sues; and that, not having done so, if Mr. Bogue, or any body else, simply pirated—that is, simply took *verbatim et literalim*—every portion of that which was new for the first time in the second edition, or any other edition published after the passing of that act, Mr. Bogue might do that with perfect impunity, and Mr. Murray would have no redress until he

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registered his new work at Stationers' Hall, and then he might sue, either at law or in equity. Now, one may conceive a case in which the alterations made in a subsequent edition are extremely trifling — it may be the alteration of a few words, by way of correction, only; but one may also conceive a case in which a second or subsequent edition may contain four times the matter which a prior edition has. We have particular instances of that in law books. The first edition is often a very slight treatise, and it swells in subsequent editions to a very bulky one; but it signifies to my mind nothing whatever what is the extent of the additions and alterations; to the extent to which it is thus altered and added to, and to the extent which it is thus made new, that new part cannot be protected by suit, unless the party has registered at Stationers' Hall. But how does that operate with regard to the old part? Why, surely, it leaves the copyright in the old part just where it was. If Mr. Bogue, or any other party, takes that which, being contained in the first edition of Mr. Murray's book, is also contained in the second or any other subsequent edition of Mr. Murray's book, in that respect Mr. Murray may protect his copyright, because that was a book published prior to the passing of the act; and prior to the passing of the act no registration was requisite in order to give the party the right to sue.

Now, that brings me to this point, not that the defendant's argument can prevail to the extent to which he presses it, namely, that Mr. Murray can have no relief at all, that Mr. Bogue may copy Mr. Murray's book *ad libitum*, and that there can be no redress for want of registration; but to this extent it has its effect, and it is not altogether an inconsiderable effect, that I must discard all reference to every edition of Mr. Murray's book but the first, inasmuch as the second and subsequent editions were published after the passing of the 5 & 6 Vict. If Mr. Bogue had simply transcribed all that is new in the subsequent editions, and nothing contained in the first edition, clearly, according to the terms of this act of parliament, Mr. Murray could have no redress. Therefore, although I have been referred throughout to the edition of 1846, I must discard the edition of 1846; I must discard even the edition of 1842, because that I must take to have been published after the passing of the act of parliament; and I must confine myself entirely to the edition of 1838 — that is the only edition which was published prior to the passing of the 5 & 6 Vict. But still the edition of 1838, the first edition, does contain a vast bulk of what is contained in the subsequent editions; although, as I have said, the question of the much or the little is not the question with regard to the right to protect a man under the 24th section of the 5 & 6 Vict. Whatever is in the first edition, it appears to me, Mr. Murray has a right to protect, whether contained in the subsequent editions or not; but whatever is new in the subsequent editions Mr. Murray has no right to protect.

Now, this brings me, therefore, to consider how far Mr. Bogue's book is a piracy of any thing contained in the first edition of Mr. Murray's work published in the year 1838; and I may say this, that beyond all question, at least I am quite satisfied in my own mind,

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that to some extent, Mr. Bogue has used Mr. Murray's book. A great many instances were adduced in argument by counsel—some of those stated in the bill, some stated not in the bill but in the affidavits, and some stated by the counsel at the bar—a great number of instances were adduced for the purpose of showing that Mr. Bogue, or Mr. Walker, who compiled Mr. Bogue's book, had copied errors. That is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book. But I think that this argument, arising out of those errors, was pressed a little beyond what it will bear. The use of showing that the defendant's book has got the same errors as the plaintiff's book is this, that where the defendant says, "Oh, I got all this matter, not from your book, but I got it from other sources; there is such a work, and such another work, and so on, and I put that together, and I made out my work from that." If there be a contest whether the defendant has used the plaintiff's book at all, the showing that he has copied an error is of course a very strong argument to convince one of that. Well, a great many instances that have been stated, I think, are really explained, and do not apply. [His Honor then read some of the passages.] I have not the slightest doubt whatever, that to some extent the defendant, Mr. Bogue, has used the plaintiff's work. I do not suppose he used the first edition, nor do I suppose he used the edition just before me—the edition of 1846. I think the probability is, that he used the latest edition that he found then published. He published his book in 1852—the latest edition of Mr. Murray's existing was the fourth edition, the edition of 1851. The probability is, he took that; however, it is not material which he took. I am perfectly satisfied, from one or two little matters which convince me, that to some extent he used the plaintiff's book; and that is the use of the argument arising from any alleged copies of mistakes in the plaintiff's book. [His Honor then read some other passages.] Now, I have already said I find this, that in a great many passages, by no means in the whole of the book, or perhaps in any vast portion, but still in a great number of places—as, for example, in the whole description of the town of Basle, which occupies many pages—I find that Mr. Bogue's book is a translation generally, an abridged translation, of Baedekker's German work. However, it did appear to me that this view ought to be taken of the question—putting an extreme case—if Baedekker's was a translation of Mr. Murray's book into German, and then the defendant had re-translated it into English, even if he did not know Baedekker's book to be a translation from Mr. Murray's, I never could allow the plaintiff's book to be indirectly pirated in that way.

I am putting an extreme case in order to try the principle. I have therefore gone through a great part of Baedekker's book, and I find that in the preface he acknowledges the advantages he has derived from Mr. Murray's book, and acknowledges that the groundwork of his book is Mr. Murray's, though he has repeatedly travelled over a great part of the country, and ascertained the accuracy of the description. And the conclusion of fact at which I have arrived is, that his book, though it has taken Mr. Murray's as a groundwork, is substan-

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tially an original work. Whether Baedekker's book has taken so much from Mr. Murray's that if it were an English book, published in England, this court would say Baedekker has made an unfair and too much use of Mr. Murray's book, may be a question; but at all events, I have no doubt in my own mind that Baedekker's book is a *bond fide* original publication, making very free use of Mr. Murray's book; but it is not necessary for me to decide whether he has made too free a use, and what amounts to an unfair use, of Mr. Murray's book. Now, with regard to the comparison between Baedekker's book and the defendant Bogue's book, I find that in many parts it is literally a transcript of Baedekker, Baedekker's book being published in the year 1848, and the defendant Bogue's book in the year 1852; so that it was to be expected that he should use Baedekker's book; and he has done so, and he has done so not only very freely, but it is often a simple servile copying.

In other parts of the defendant's book, especially in those parts which consist of the description of scenery, the defendant has freely taken and extracted from Dr. Cheever's book. Dr. Cheever, being an American, who had travelled in Switzerland, gives some very interesting and florid descriptions of scenery, and in many parts the defendant has transcribed passages from Dr. Cheever. Now, Dr. Cheever's book, no doubt, was compiled by a person who had Murray's book in his hand, because Dr. Cheever, like every other rational being who might travel in Switzerland, would take Murray's book with him. He had Murray's book with him; and I do not see how it is possible for any human being who happens to have, as he would naturally have, and as he ought to have, Mr. Murray's Handbook to travel in Switzerland, if he is writing either letters to his friends, or a tour which he means to publish, to avoid most fairly having passages which are, in effect, if not servilely transcribed from, at least taken from the ideas and the particulars got from Mr. Murray's Handbook; and nobody would pretend, I apprehend, that Dr. Cheever's book could be any thing approaching to a piracy of the plaintiff's book; in fact, Dr. Cheever's book, though an American work, is published in England, and if Dr. Cheever's book were a piracy, it might have been proceeded against by Mr. Murray. Nobody would dream—no counsel could ever suggest—the possibility of success in attempting to restrain the publication of Dr. Cheever's book as a piracy of Mr. Murray's. Now, I confess I have had very great difficulty, partly owing to the physical difficulties of having to go through the German works, but partly owing to the matter itself, in arriving at the conclusion in my own mind whether, taking Mr. Bogue's book to have been written and composed, with a certain use of Murray's book itself, and taking his book also to have been clearly compiled with a free and unlimited use of Baedekker's book and of Dr. Cheever's book—although I also do find cases in which he has borrowed from Weiss's book, the *Manuel du Voyageur*, and it may be from Mr. Ebel's book here and there—Mr. Ebel's book, being alphabetical, was not so likely to be borrowed from, but still there are passages, I have no doubt, taken from him;—taking his book to be composed in that way, and taking

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it to be a book I ought to look at with great jealousy, by reason, that it does not profess to be the work of a person going to the spot, and compiling from the sources there accessible — his own book, but compiled from the labors of others — taking it to be a book, I say, which ought to be looked at with great jealousy, on that score, I confess I have had very great difficulty in coming to a conclusion in my own mind, whether the use which has been made, and the benefit which has been derived, by the defendant from the plaintiff's book, whether directly or indirectly, has been unto such an extent as to come up to what I think Lord Cottenham calls "the extraction of the vital parts of the book" — that is, whether it amounts to what may be described in other language, and is described in other language, a fair or unfair use of the book.

The difficulty is obvious at first sight, independently of the particular difficulties, by reason that in any book which professes to be a handbook or guide to travellers in Switzerland, of necessity you must have a great deal the same — it is obvious, that in any road-book, whether it be a more mechanical road-book like the old English road-books, or the more literary road-books, if I may use the expression, which Mr. Murray's undoubtedly is, it is an extremely difficult thing to see how far, the subject being the same, and the details necessarily to a great extent the same, the one has fairly or unfairly used the work of the other. The conclusion I have arrived at on the whole is, that I cannot say that the defendant's book is an unfair use of Mr. Murray's book. I confess, that as I have gone through the work, I have sometimes come to parts where I have had a strong leaning one way, but immediately afterwards I came to another part which made a strong leaning the other way; but the result of the whole is, that I am obliged to come to the conclusion — I will not say I am absolutely and entirely satisfied that the use made might not be looked at, by a judgment more experienced and able than mine, in quite a different light — but, looking at it as I do, I cannot see that there is a case for me to exercise the jurisdiction of restraining the publication of the defendant's work; and of course I could not grant that injunction unless I was satisfied, which I am not, that an unfair use has been made of the plaintiff's work.

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December 10, 11, and 18, 1852.

Letters, amounting to Evidence of a Contract for Sale of Lands, binding on both Vendor and Purchaser.

A vendor, C., wrote to his own solicitor, "H. has agreed to purchase my estate in this county for 60,000*l.*, including the timber. . . . I have shown this to H., and given him a copy,

¹ 17 Jur. 225.

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not signed, as a memorandum." A month afterwards, in the course of correspondence concerning the terms of a formal agreement which was to be prepared, the purchaser, H., wrote to the same solicitor of the vendor, "I beg to know when you will forward the agreement to be entered into with C. relative to the purchase I have concluded with him for his estate in this county:—"

Held, that these two letters, taken in connection with other correspondence, referred to the agreement and memorandum mentioned in C.'s letter, and with it constituted evidence of a contract, so as to bind both C. and H., and that thereupon H. had a devisable interest in the estate.

If the last letter had not been written, so that there had been only evidence in writing to bind C., *semble*, that H. would still have had a devisable interest; *sed quare*.

In August, 1836, Major Gwynne Holford, since deceased, commenced a treaty with Mr. Charles Fox Champion Crespigny, on the part of himself and his eldest son, Charles John Champion Crespigny, for the purchase of two estates in Wales, one called "The Tal-y-lyn Estate," and the other called "The Cathedine Estate." On the 11th October, 1836, the said Charles Fox Champion Crespigny wrote to his solicitor, Edward Clarke, the following letter:—"My friend, Major Gwynne Holford, has agreed to purchase our estate in this county for 60,000*l.*, including the timber, our producing a sufficient title; it being understood that some small things purchased subsequently to the main purchase have a good holding title, but not an objectionable one, will be no bar to the purchase. The expense of the title and conveyance will be paid by the purchaser as usual. I will assign to the major the written agreements unexpired, as follows:—About eight acres in Cathedine, from Lewis Parry, rent 13*l.*, for six years; four from Mr. Arthur, rent 5*l.* 5*s.*, for twenty years; and a barn at Langrose, rent 6*l.*, for six years. The major to retain 17,000*l.* during the life of my mother, Lady Keane, at 3*l.* 10*s.* per cent. interest, to be paid half-yearly, in order to meet her jointure charged on the estate of 600*l.* a year. Will you have the goodness to settle an agreement on the basis of the above, for us to sign. I shall be in town on Friday morning, and will have the pleasure of calling on you." And to this letter was written a postscript by the said Charles Fox Champion Crespigny, in the following words:—"I have shown this to the major, and given him a copy, not signed, as a memorandum."

The memorandum referred to was in the handwriting of the said Charles Fox Champion Crespigny, but undersigned, and it was in the following words:—"Memorandum. Major Gwynne Holford has agreed to purchase our estate in this county for 60,000*l.*, including the timber, our producing a sufficient title; it being understood some small things purchased subsequent to the main purchase have a good title, but not an objectionable one, will be no bar to the purchase. The expense of the title and conveyance will be paid by the purchaser, as usual. I will assign to the major the written agreements unexpired, as follows:—About eight acres in Cathedine, from Lewis Parry, rent 13*l.*, for six years; four acres in Cathedine, from Mr. Arthur, twenty years, rent 5*l.* 5*s.*; and a barn at Langrose, six years, rent 6*l.* The major to retain 17,000*l.* during the life of my mother, Lady Keane, at 3*l.* 10*s.* per cent. interest, to be paid half-yearly, in order to meet her jointure charged on the estate of 600*l.* a year. To

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settle an agreement on the basis of the above, for the parties to sign."

Much correspondence followed. On the 14th October, 1836, Charles Fox Champion Crespigny wrote to Major Holford a letter concerning certain agreements made by him for leases to farm tenants, containing the words, "If you think, which I do not, that these leases depreciate the value of the property, I have no wish that you should consider yourself bound to the purchase of it, and there is an end of the matter." On the 16th he again wrote—"Do not imagine that it has been my wish that you should be in the smallest degree surprised into the engagement, or that you should not have the fullest and most patient investigation of every bearing connected with this business, so important from the amount of its value. The agreement to be proposed for our signature, which Mr. Clarke is preparing, will be conceived in the most liberal and honorable terms." Messrs. Richards & Clarke, as solicitors of Mr. Crespigny and his son, prepared a draft of the heads of agreement for the sale of the said estates, which draft was intitled "Instructions for preparing an agreement with Charles Fox Champion Crespigny and Charles John Champion Crespigny for the sale to Major James Price Gwynne Holford of two estates,....including the timber on both estates, at or for the price or sum of 60,000*l*." And on the 26th October, 1836, Edward Clarke sent the draft to the said Charles Fox Champion Crespigny, with a letter of that date, saying, "I have drawn from the different materials in my possession the heads of the proposed agreement with Major Holford, and sent it to you for perusal.... In case you and Major Holford meet, I would recommend you to avoid the possibility of your committing yourself, by alleging that, as the matter is now in professional hands, any discussion between you and him would be useless." The said Charles Fox Crespigny and Edward Clarke afterwards went through the draft together, and settled it, and it was then laid before counsel to prepare a contract, with instructions "to add to the draft of the intended contract such stipulations on the part of the said Major Holford as, on a perusal of the abstract, he might deem expedient to be inserted therein, for the security of the said Charles Fox Champion Crespigny, and to prevent litigation or expense to him in carrying the contract into execution, or to vary the same in such instances as he might deem prudent and proper."

On the 1st November, 1836, Charles Fox Champion Crespigny wrote to Major Holford—"I cannot sufficiently express my regret that you should have had any trouble concerning our agreement, in consequence of the circumstances in which I am placed with respect to the leases on my estate.... If the agreements now subsisting between me and my tenants depreciate the value of the property in your estimation, pray let me know, and I will certainly not think of holding you to any engagement about it. Pray let me hear from you at your earliest convenience, that, in case you have any objection to my agreements about the leases, I may direct my solicitor not to proceed any further with the preparation of deeds, &c., for the sale. The intended agreement between us, which is necessarily very special, is

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in course of preparation." On the 12th November, 1836, the said Charles Fox Champion Crespigny wrote to the said Edward Clarke — "I have only this morning an answer from Major Holford, who is far from desiring to be off, but he says that he considers me bound in honor to release the estate from the promised leases." On the 29th November, 1836, the said Major Holford wrote to the said Edward Clarke — "I beg to know by return of post when you will forward the agreement to be entered into with Mr. Crespigny relative to the purchase I have concluded with him for his estate in this county. Mr. Crespigny, on his return to Cathedine, a fortnight since, gave me to understand that you would despatch it in the course of a fortnight; and as this period has elapsed, I cannot comprehend the cause of the delay. I hope you will expedite the business."

The draft agreement was afterwards prepared, and settled on the part of the vendors, but not signed, and it was sent to Major Holford on the 24th December. Major Holford made his last will, dated the 9th January, 1837, and thereby bequeathed to the plaintiffs, C. Morgan and G. Stevenson, all his personal estate, whatsoever and wheresoever, (excepting certain portions,) upon trust to stand possessed thereof, "in the first place, to complete the purchase which I have recently made of Charles Fox Champion Crespigny, Esq., and to get the same conveyed to them, upon trust to secure thereout the annual sum of 2,000*l.* to my dearly beloved wife during her natural life, free of all charges; and subject thereto, to be held by my said trustees to the same uses and upon the same trusts as the Buckland estate is settled upon by my marriage settlement, with this alteration, that I charge my said new-purchased estate with the sum of 10,000*l.*, payable, after my said wife's decease, to and between my younger children, in addition to the portions secured to them by the said deeds of settlement made previous to my marriage. I further direct, that if my said purchased estate is not sufficient to make up the income of 2,000*l.*, then that it shall be made up out of my personal estate." Difficulties afterwards arose concerning the terms of the draft contract, and Mr. Crespigny wrote to Major Holford's solicitor on the 19th January, to say that he should consider the treaty at an end if the agreement was not accepted by Major Holford within ten days. The agreement was afterwards executed, with but slight alterations, and in April and May, 1837, the said estates were conveyed to Major Holford in fee simple for the sum of 60,000*l.* On the 20th June, 1845, Major Holford mortgaged the Tal-y-llyn estate in fee simple to Sir R. Fitz Wygram, to secure 11,000*l.* and interest. Major Holford died on the 4th August, 1846, without having republished his will. The several parties interested as his devisees and representatives concurred in stating a special case, representing these facts to the court, in which the principal questions were, whether the equitable estates in the said premises passed by the will of Major Holford to the plaintiffs, to be held by them upon the trusts of the will; and if so, whether such equitable interest ought to be exonerated from the said mortgage debt of 11,000*l.*

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Glasse, Q. C., for the plaintiffs, the trustees.

Malins, Q. C., and *G. L. Russell*, for Major Holford's widow. Major Holford had a devisable interest at the date of his will, because he could enforce performance of the contract, even if it was not binding against him. The subject-matter of the contract, the price, and the parties were certain, and there was a good memorandum or note in writing of all these things, signed by Mr. Crespigny for himself and his son. It did not signify that this was only in a letter written by Mr. Crespigny to a third party. Such a letter is sufficient evidence of the contract to bind the writer. *Broome v. Monck*, 10 Ves. 511; *Ogilvie v. Foljambe*, 3 Mer. 53; *Kennedy v. Lee*, Id. 441, and it is not affected by the circumstance that further negotiation is contemplated by the agreement upon some small details. *Fowle v. Freeman*, 9 Ves. 351. If the letter refers to another document, from which the terms of agreement can be gathered, it will be sufficient. *Owen v. Thomas*, 3 My. & K. 353; *Gibbins v. The Board of Management of the North-Eastern Metropolitan Asylum District*, 11 Beav. 1. Thus the two letters of the 11th October and the 29th November may be connected, for they both refer to the memorandum, which contained all the terms of the contract; and these documents, taken together, form a complete contract, binding on both sides. The terms of Major Holford's will remove all doubt, for the first trust of the personal estate was to complete the contract; and if he had died immediately, his heir could not have denied the existence of the contract.

[STUART, V. C. That is a clear executory trust; the question is, how far it was affected by what afterwards took place.]

He afterwards signed a formal contract, and subsequently the original contract was carried into effect.

[STUART, V. C. He did not take a conveyance to the uses of the settlement.]

No; because he intended his will to declare the uses and trusts of it after his death, but he did not wish to deprive himself of it during his life.

[STUART, V. C. He took out a great part of the estate by subjecting it to a mortgage.]

But that must be paid off by his personal estate. His intention was unchanged, or he would have altered his will.

Elmsley, Q. C., for the younger children of Major Holford, in the same interest. The correspondence proves a concluded agreement on both sides. *Saunderson v. Jackson*, 2 B. & P. 238; 9 Ves. 250, and *Clinan v. Cooke*, 1 Sch. & L. 22, were similar cases, in which, by connecting various documents, none of which were alone sufficient, evidence of the contract, which satisfied the Statute of Frauds, was obtained.

Bailey, Q. C., and *Greene*, for the heir at law of Major Holford, contended that the property in question did not pass by his will. The hardship of defeating the testator's intention cannot be considered.

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Admitting that if, at the date of the will, there had been a contract binding on both parties, Major Holford would have had a devisable interest, there was here no contract at that time, but only a treaty for the purchase. But if there was a contract, it was binding on Mr. Crespigny and his son only, and that did not give Major Holford a devisable interest. First, there was only a treaty, for the letter of the 11th October merely says that a basis for a future agreement had been fixed, and it was so mentioned by the parties in their subsequent correspondence.

[STUART, V. C. What was that basis? They say it was that Major Holford was to purchase the estates for 60,000*l*. If you deny that, I think you will increase the difficulty of your case.]

Both parties distinctly understood, that if a final contract were entered into, the purchase-money was to be 60,000*l*.; but the intention was, that nothing should be binding until there was a formal agreement; while that intention continued, the matter was only in treaty, and no paper writing could bind either side. But if there was any thing more than a treaty, it was at best but an unilateral agreement. The letter of the 29th November referred to no document whatever, and the case is therefore not like *Dobell v. Hutchinson*, 3 Ad. & El. 355.

[STUART, V. C. You argue that a reference by implication will not do, as in *Boydell v. Drummond*, 11 East, 141, where there were two documents, and it was impossible to know which was referred to.]

It is for them to show that there was a sufficient reference to the memorandum. We say there was not. *Western v. Russell*, 3 V. & B. 187, was a different case; there there were two letters written by the same person to the same correspondent, which were necessarily connected. Therefore, if the contract was binding on Mr. Crespigny, it was not binding on Major Holford; and to give him a devisable interest he must also have bound himself before the date of his will; or else, if he had died intestate, leaving an infant heir, the vendors must have waited until such an heir came of age before they could know whether he would elect to complete the purchase or not. *The Earl of Radnor v. Shafto*, 11 Ves. 448. Or if the devise were in strict settlement, the tenant for life could not elect against the remainder-man, and there would be a similar suspense. No rule of law would produce such absurd results.

[STUART, V. C. Have you authority to treat it only as a matter of election? It is new to me, on the principle of *Martin v. Mitchell*, 2 J. & W. 413, that if there be an agreement for sale and purchase signed only by the vendor, the purchaser has nothing but an option.]

He cannot have any thing more.

[STUART, V. C. I think he has an equitable right to compel performance of the contract.]

He has the power, by signing the contract, at once to give himself an equitable interest.

[STUART, V. C. Is not the will in this case a declaration of the option?]

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The will has no operation until after the death of the testator, and *eo instanti* the estate descended to the heir. *Buckmaster v. Harrop*, 7 Ves. 841.

The trustees being plaintiffs, there was no reply.

STUART, V. C. The argument in this case proceeds mainly on the question, whether, on the evidence, which is principally documentary, of what took place before the date of the will of Major Holford, there was a valid contract for the purchase of the Tal-y-llyn and Cathedine estates. As the contract was completed soon after the date of the will, and in the life of Major Holford, the case is relieved from the difficulty which occurred in *Broome v. Monck*, 10 Ves. 511, and is only to be considered upon the acts of the contracting parties antecedent to the date of the will. It has been contended for the heir at law, that the true construction of the acts of the parties antecedent to the will, and to the execution, after the date of the will, of a formal agreement for the purchase by the contracting parties, is, that no binding agreement for the purchase of the estates had been made, but only a basis agreed upon for the discussion of the terms on which the treaty for a contract to be executed was to proceed, and that it was understood between the parties, that until a formal agreement was prepared and executed, neither party was to be considered as bound. On the part of the widow and younger children of Major Holford, it has been contended that the basis of the formal agreement was an actual agreement, in general terms, that Major Holford should purchase, and Mr. Crespigny sell to him, the estates for 60,000*l.*, and that the formal agreement which was to be prepared was merely to settle the necessary details upon points relating to the tenancies on the estates, the title, and other matters, upon which the parties, by coming to a distinct understanding by specific stipulations, might, on fair discussion, escape the danger of an adverse litigation to settle the various points likely to arise in carrying into effect a general contract for the purchase of a considerable estate, the title of which had not been investigated.

In a letter of the 11th October, 1836, the vendor, Mr. Crespigny, wrote to his solicitor, that "Major Holford has agreed to purchase our estate in this county for 60,000*l.*, including the timber, on our producing a sufficient title," &c.; and in the same letter said, "I have shown this to the major, and given him a copy, not signed, as a memorandum." This letter also desired the solicitor, to whom it was addressed, "to settle an agreement on the basis of the above, for us to sign." It is well settled, on sound principles, that if the main terms of an agreement for the sale and purchase of the estate be concluded, and those main terms are expressed in a writing signed by the party sought to be charged, that makes a binding contract, although there may be an arrangement between the parties to have a formal contract prepared for their signature. In the present case, in none of the many subsequent letters or acts of the parties is any thing to be found to alter or vary the essence of that agreement as to the contracting parties, the estate which was the subject of the contract, or the price to be paid. The subsequent discussions were entirely on minor

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points. It is not disputed, for the heir at law, that the letter of the 11th October is evidence that a basis for the subsequent treaty had been agreed upon. But as it is admitted that it is evidence of an agreement as to a basis, where the argument for the heir at law fails on this point is, to show that this basis was any thing short of the general contract to sell the estate for 60,000*l.* to Major Holford, including the timber, on producing a sufficient title. There can, therefore, be no doubt, on this view of the case, that, on this evidence in writing signed by the vendor, Major Holford, before he had signed any memorandum or evidence in writing of the contract, might, on the well-established authorities, have enforced the performance of this agreement. But then it is contended, that this right to enforce the contract not signed by himself, being a right little more than an option, was not a devisable interest. As, in my opinion, the letter of Major Holford of the 29th November, 1836, to Mr. Crespigny's solicitor, in which he said, "I beg to know when you will forward the agreement to be entered into with Mr. Crespigny relative to the purchase I have concluded with him," on the plain construction of it, taken in connection with the whole correspondence and transaction, is clear evidence to bind him, it establishes a complete mutuality, in point of signature on his part, of the agreement which was mentioned in the letter of Mr. Crespigny of the 11th October.

The facts of the case, upon that which seems to me the only correct view of them, exclude entirely the argument by which the proposition was maintained, that a contract for the purchase of an estate, being a contract certain in its terms, but signed only by the vendor, not being signed by the purchaser at the date of his will, although completed afterwards, does not give the purchaser a devisable interest in the estate. Every lawyer who has well weighed the observations of Sir Thomas Plumer in the case of *Martin v. Mitchell*, 2 J. & W. 426, and what he noticed as having fallen from Lord Eldon, Lord Redesdale, and Sir William Grant, as to the right of a party to enforce in equity a contract, which he had not himself signed, against the other party who had signed it, must feel the difficulties which surround the proposition, that the interest of a purchaser who has made, but has not actually signed, a contract, the terms of which are clearly proved, and which are signed by the vendor, is not a devisable interest in the estate which is the subject of the contract. The difficulty of maintaining such a proposition is greatly increased where the purchaser in such a case, by his will, directs the contract to be carried into effect. In the present case, as it is my opinion that the letter of the 29th November must be construed, on a fair view of the evidence, as referring to the agreement and transaction stated in the letter of the 11th October, and therefore to the memorandum referred to in that letter, and cannot be held as referring to any thing else, the difficulty which might otherwise have occurred does not arise; and I must hold that there was a valid contract for the purchase of the estate by Major Holford before the date of his will, and that his equitable interest under that contract passed by his will. In the case of *Broome v. Monck*, 10 Ves. 511, the difficulty arose from the title of the estate

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having, after the testator's death, been reported to be a bad title, which put an end to the contract. Any ordinary contract for the purchase of an estate might fail on that ground. But the testator might in his lifetime have agreed to accept the title, however defective; and no argument seems to have been suggested for the devisee in *Broome v. Monk* as to how far the direction in the will to complete the contract could be held to amount to an acceptance of the title. The case of the devisee there failed from his attempt to enforce a right to have the purchase-money invested for his benefit in other real estates. Upon the whole, in this case, after the best consideration, I can come to no other conclusion than that the right of the heir at law is excluded by the devise in the will of Major Holford. Declare, that the equitable interest of Major Holford in these estates passed by his will.

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December 2, 3, and 6, 1852, and January 8, 1853.

Statute of Limitations — Marshalling — Devise for Payment of Debts.

G. S., by his will, dated in 1837, devised a particular estate, for providing for the payment of his debts, to his trustees, who were also his executors, and beneficially interested under other parts of his will. G. S. died in February, 1843. In August, 1849, a creditors' suit was instituted by F., claiming as personal representative of the payee of a joint and several promissory note made by the testator and another person, and dated 1826; and payments were proved to have been made, on account of interest due on such promissory note, on several different occasions in 1843, 1846, and 1847, by T. & Co., "as the agents and on behalf of the executors, the defendants." One of the executors of the testator had become bankrupt; the other two were stated to be now insolvent. The estate devised for payment of debts had not been sold with proper expedition; and though debts of the testator remained unsatisfied, considerable sums were alleged to have been paid on account of the legacies. The present bill sought to fix the executors for wilful default and breach of trust, and to get back the amounts paid to the legatees. All the defendants, except the executors and one other defendant, set up the Statute of Limitations:—

Held, first, that the executors, who had not set it up, were bound in their beneficial, as well as representative capacities, by the part payments on account proved to have been made.

Secondly, that the other defendant, who had not set up the statute, was also bound by the implied admission by the executors.

Thirdly, that it was open to the other defendants, (except the residuary legatees,) to avail themselves of the statute; and that those who had set it up were accordingly entitled to have the bill dismissed as against them, but without costs.

Fourthly, that as to the residuary legatees, the payments to them, while there were debts outstanding, being a breach of trust, they could not set up the statute, but must refund the sums received.

Seem, one party is not to be bound by the admissions of another, so as to prevent the statute from running, unless in the case of a continuing joint contract.

¹ 17 Jur. 228.

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The doctrine of marshalling ought not to be resorted to, merely for the purpose of giving to a simple contract creditor, a longer period of limitation.

There is no right of contribution between defendants who have protected themselves against a demand by setting up the statute, and other defendants who might equally have set up the statute, but who, having neglected so to do, are found by the decree to be liable to the plaintiffs.

THIS was a creditor's bill for the administration of the real and personal estate of G. Starkins. The plaintiffs were the executors of E. H. Fordham, and the debt upon which the suit was founded was claimed upon the joint and several promissory note of G. Starkins and G. S. Wallis, for 2,000*l.* and interest, dated the 14th November, 1826. G. Starkins, by his will, dated the 18th October, 1837, gave — first, White's and Oate's Farms to G. S. Wallis, Frederick Chaplin, and Frederick Woodham Nash, and their heirs, during the life of Sarah, then the wife of Charles Weld, upon trust for her separate use, with various remainders over; secondly, High Laver Farm, in strict settlement; thirdly, Hog's Farm, charged with an annuity of 100*l.* per annum to J. Ingersole, and subject thereto to Frederick Woodham Nash, his executors, administrators, and assigns, for a term of 1,000 years, with various limitations over, (the trusts of the term of 1,000 years were in part to raise 2,000*l.* for a Mrs. Cheeseman; and among the limitations was one to Frederick Chaplin, as a trustee to preserve contingent remainders; and a power of leasing was also given, to be exercised by the trustees, Wallis, Chaplin, and Nash, during the minorities of the persons beneficially interested); fourthly, certain estates at Bishop's Stortford and elsewhere, charged with the payment of all the testator's "just debts, funeral and testamentary expenses, in aid of his personal estate; and subject thereto, as to one moiety of such estates, to G. S. Wallis in fee, and as to the other moiety, to the children of A. Ingersole, (except J. Ingersole,) as tenants in common in fee; fifthly, a house, in which the testator resided, to Frederick Chaplin, in fee, with power for him to purchase other property; sixthly, legacies, and subject thereto one moiety of the residue of his personal estate to G. S. Wallis, and the other moiety to the children of A. Ingersole, (except J. Ingersole); and, lastly, the testator appointed G. S. Wallis, Frederick Chaplin, and Frederick Woodham Nash executors of his will. The testator afterwards made two codicils, and died on the 22d January, 1843. The bill was filed on the 8th August, 1849. The defendants were the executors and residuary legatees, and the persons beneficially interested under the devises contained in the will. Frederick Chaplin had become bankrupt, and G. S. Wallis and Nash were said to be insolvent. All the real estates fourthly devised, and charged in aid of the personalty, had been sold, and large payments had, as it was stated, been made to the residuary legatees. The bill prayed the usual account of debts, a decree against the executors for wilful default, with special inquiries, and that the residuary legatees might refund the moneys received by them, and sought to charge the real estate of the testator, (other than the estate specifically charged by his will for this purpose,) with the deficiency for the payment of his

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debts. All the defendants, except the executors and Mr. and Mrs. Cheeseman and their trustees, had set up the Statute of Limitations. The plaintiffs alleged that the case was taken out of the statute by various payments, made through the house of business of Mr. Henry Thurnall, "as the agent and on behalf of the executors" of the testator, in respect of interest on the debt, namely, 100*l.* on the 29th November, 1843; 194*l.* 3*s.* 4*d.* on the 18th August, 1846; 97*l.* 1*s.* 8*d.* on the 13th January, 1847; and the like sum on the 1st December, 1847. Two of the defendants, (Mr. and Mrs. Boddy,) were out of the jurisdiction.

W. P. Wood and A. Smith, for the plaintiffs.

Craig and Fischer, for the defendants, Wallis, Chaplin, and Nash.

Roll and Eddis, for parties in remainder after the death of the tenant for life.

Chapman Barber, for Mrs. Wright.

Elmsley and J. V. Prior, for Ingersole.

J. H. Palmer, for three sons of Mr. Cunliffe.

Glasse, Smythe, and Faber, for other parties.

The case set up by the plaintiffs was, that the estates specifically designated for providing for the payment of debts would have been ample if sales had been duly made according to the trusts. In consequence of the delay, and the interest and costs occasioned thereby, the estates were now insufficient. The following cases were cited in argument: — *Cummins v. Adams*, 2 Ir. Eq. Rep. 376; *Winter v. Innes*, 4 My. & C. 101; *Braithwaite v. Britten*, 1 Kee. 306; *Lord St. John v. Boughton*, 9 Sim. 219; *Toft v. Stephenson*, 16 Jur. 1187; s. c. 1 De G., Mac., & G. 28; *Francis v. Grover*, 5 Hare 39; *Gillespie v. Alexander*, 3 Russ. 130, and *Greig v. Somerville*, there referred to; *Crelton v. Oulton*, 3 Beav. 1; *March v. Russell*, 3 My. & C. 31, and the old cases there quoted; *Smith v. Follett*, (not reported; decree February 19, 1850); stat. 4 Ann. c. 16, s. 19; *Putnam v. Bates*, 3 Russ. 188; *Brocklehurst v. Jessop*, 7 Sim. 438; *Whitcomb v. Whiting*, 1 Smith's L. C. 318; *Neve v. Holland*, 16 Jur. 933; *Tredgold v. Atkins*, 2 B. & Cr. 23, 27; *Packman v. Timbrell*, 6 Rep. 18 b.; *Cross v. Cross*, 3 Bing. 329; *Way v. Bassett*, 5 Hare, 55; *Burke v. Jones*, 2 V. & B. 275; *Hughes v. Wynne*, 1 Turn. & R. 307; *Scholey v. Walton*, 12 M. & W. 510; s. c. 8 Jur. 319; stat. 3 & 4 Will. 4, c. 104; *Ball v. Harris*, 4 My. & C. 268; *Vickers v. Oliver*, 1 Y. & C. C. C. 211; s. c. 6 Jur. 273; but after the observations of the Lord Chancellor, (the observations of the Vice-Chancellor in that case must be confined to the very circumstances before him,) *Sterndale v. Hankisson*, 1 Sim. 393; *Gibbs*

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v. *Ougier*, 12 Ves. 413; *Wynne v. Styan*, 2 Ph. 302; and *Slater v. Lawson*, 1 B. & Al. 883.

For the plaintiffs it was contended, that if you once get to marshalling the estates, the simple contract creditor acquires the same rights as the specialty or other higher creditor, in whose place he stands; and that a simple contract creditor, therefore, coming in the place of a bond creditor, who would have twenty years to sue, has the same period of limitation. *Smith v. Follett* was a legatee's suit for the administration of this estate. In that case the bill was filed on the 3d February, 1848, and the decree obtained on the 19th February, 1850. It could not, however, and did not prevent the statute from running. At any rate, as to Mrs. Boddy's share, inasmuch as she had never come within the jurisdiction, the right was clear against her share. *Putnam v. Bates*, though often cited, had never been approved of; though it had never been overruled.

TURNER, V. C. May there not be a difference between part payment of a debt and an acknowledgment of it?

A. *Smith*. Part payment was not mentioned in the statute till Lord Tenterden's Act; though it had previously grown up under the additions of the Court of Equity to the statute of James. The doctrine in *Whitcomb v. Whiting* and *Neve v. Holland*, does not apply, where there never was a joint contract by two or more. There is here a liability attaching to the estate, and not to the persons entitled to the estate.

For the defendants it was argued, that *Toft v. Stephenson* was decided on the ground, that the parties who made the admission, were the parties chargeable with payment of the debt, within the act.

TURNER, V. C. It may occasion great inconvenience if payment of interest, by a tenant for life, of land charged with a principal debt, is not to bind the remainder-man from setting up the statute, because the creditor may receive interest for twenty years, and then lose the principal because he had not sued within six years.

Eddis. The question here is somewhat different from that. The question is, how far persons entitled only in a representative capacity, and having no beneficial interest, can bind by their admissions those who have the beneficial interest for life or in remainder. The broad principle is, that the 3 & 4 Will. 4, c. 104, gives no new remedy to the simple contract creditor, but lays open to him a new fund upon which he could not before have come. The period of limitation remains exactly where it was.

January 8. TURNER, V. C., (after stating the will and the circumstances of the case). First, with regard to the executors, who had not set up the Statute of Limitations, the plaintiffs are entitled, as

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against them, to the usual accounts of the personal estate, and of the rents, &c., and proceeds of the real estate specifically charged by the testator with the payment of his debts. As to G. S. Wallis and the assignees of Chaplin, it was agreed that their beneficial interests under the devises could not be affected by payments made by persons acting as executors, and therefore that the statute would be a good defence. But, in the first place, the statute was not set up by these defendants; and, secondly, the argument is untenable on principle. The payment of interest is an acknowledgment of the debt, and the law implied from such acknowledgment a promise to pay the principal. Upon a general acknowledgment, a general promise to pay must, in the absence of any thing said to the contrary, be implied, the implication resting upon the moral obligation to pay; and where the acknowledgment has been made by one who fills the double character of executor and devisee, the implication must attach to him as much in the one character as the other. This was not like the case where the party making the payment held two perfectly distinct characters, as in *Atkins v. Tredgold*, 2 B. & Cr. 23; and *Way v. Bassett*, 5 Hare, 55; for there the question was rather by whom the promise was made, than as to the effect of the promise itself. Thirdly, authority was against the argument; for in *Putnam v. Bates*, 3 Russ. 188, Mrs. Bates's interests, both in the real and personal estate, were held to be affected.

Secondly, with respect to the interest of Mrs. Cheeseman, as the statute had not been set up, this interest could not be protected. Thirdly, as to the residuary legatees, the statute furnished no bar, the payments to them while the debts remained unpaid being a breach of trust on the part of the executors; there must, therefore, be an account of the moneys paid to these parties. Fourthly, as to White's and Oate's Farms, and the parties beneficially interested therein, the plaintiffs have denied the authority of *Putnam v. Bates*, insisting that it was founded upon an erroneous analogy, and contravened by *Brocklehurst v. Jessop*. The case of *Putnam v. Bates*, however, has been repeatedly recognized, if not followed; it has clearly not been overruled, and has stood for twenty-five years; and I am not disposed to dissent from the grounds on which it was decided, namely, that one party was not to be bound by the admissions of another, except in the case of a continuing joint contract; *Atkins v. Tredgold*; *Slater v. Lawson*; and it ought not to be in the power of any person, by his admission, to revive a right against another which, but for that admission, would have been wholly extinguished. It has, however, been said, that here, and in *Putnam v. Bates*, the liability of the real estate was so connected with that of the personal estate, that the principle was inapplicable. I think, however, that the question in these cases is, what was the act of the person, not what was the position of the estate; and the existence or non-existence of the demand depends upon the acts of the person, not upon the relative liability of the property. It may be difficult to distinguish between *Putnam v. Bates* and *Brocklehurst v. Jessop*; but the former case was not cited in the argument of the latter; and what fell from the court in the

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latter case was a dictum merely, the case having ended in inquiries. I do not think that the distinction founded on the fact that the testator has charged part of his estates with the payment of his debts could be maintained, nor can the right of the plaintiffs be considered to subsist for twenty years under the doctrine of marshalling. The true ground on which the case of *Vickers v. Oliver*, 1 Y. & C. C. C. 211, was decided, was that stated in *Busby v. Seymour*, 1 Jo. & Lat. 527; and the case of *Gibbs v. Ougier*, 12 Ves. 413, only decided that the court may marshal assets, although the right to marshal be not distinctly raised upon the pleadings—not that the court will in every case marshal assets at the instance of a plaintiff whose immediate right is barred by the Statute of Limitations. Simple contract creditors have at present a direct right against the real estate, in case of a difficulty of the personalty, independently of the doctrine of marshalling; and for whatever purpose it might be necessary to keep on foot the doctrine of marshalling, that doctrine should not be employed in order merely to give indirectly a right which could not be asserted directly. That would, in effect, be to create in equity the same limitation as to simple contract debts as the statute had prescribed as to specialities.

It has been urged, that, as to the fee of these estates, or at all events as to the life-estate, the plaintiffs' debt has been kept alive by the payments of interest made by the executors, who were also trustees of the life-estate; but, upon the evidence, I think, that these payments were made by the executors in their character of executors only, and do not, therefore, affect the real estate; and in this view of the case it is unnecessary to refer to the cases which were cited as to the *cestuis que trust* being bound by payments made by their trustees. Lastly, the plaintiffs have relied upon the right to contribution; and *Brailhwaite v. Britten* and *Winter v. Innes*, were referred to for that. These, however, were cases of partnership, and their authority does not therefore reach the present case; and, upon principle, I think that parties who might have availed themselves of the statute cannot insist upon contribution from others, who, by setting up the statute, have succeeded in repelling the charge against themselves. Fifthly, the same principles must apply as to the parties interested in Hog's Farm, except Mr. and Mrs. Cheeseman. With respect to the laches of the plaintiffs, which had been much relied on by the defendants, I observe, that the defendants had themselves a right to secure the due application of the personal estate, and cannot therefore succeed against the plaintiffs upon the ground of their having neglected to do so. As to Mr. and Mrs. Boddy, the evidence does not show when Mrs. Boddy went abroad, and therefore there was no proof that the statute might not be a bar in this case also.

The decree declared that the real estates taken under the will by G. S. Wallis, Frederick Chaplin, and Mr. and Mrs. Cheeseman, were subject to the payment of the testator's debts; and the bill was dismissed as against the other parties, except the residuary legatees and executors, but without costs.

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Upon the suggestion of the Vice-Chancellor, the prosecution of the decree in the present case was directed to be carried on at chambers, and an application was to be made that the inquiries directed in the suit of *Smith v. Follett* should be transferred to the present suit.

LORD BARRINGTON v. LIDDELL.¹

November 15, 16, and 24, 1852.

Thellusson Act — Accumulations — Portions for Children — Interest of Parent under "any such Devise" — Practice — Special Case.

By a marriage settlement of 1823, family estates at B., of which Lord B. was tenant for life in remainder, were charged with a sum varying from 20,000*l.* to 40,000*l.*, according to the number of younger children of Lord B., for their portions, which portions were to be divided and payable among the younger children as Lord B. should by deed or will appoint; and in default of appointment, equally to be divided among them and payable at the decease of Lord B., with a power in Lord B. of advancing any child's portion in his lifetime. The Bishop of D., the great uncle of Lord B., by his will, dated in 1825, reciting the settlement of 1823, bequeathed 15,000*l.* to trustees, upon trust to accumulate the same during the lifetime of Lord B., or if he should die within the term of twenty years from the decease of the testator, for such further period as should make up the full term of twenty years from the decease of the testator; and upon completion of the accumulation, to apply the same, or a competent part thereof, in discharge of the said portions, when and as the same respectively shall become payable, and in exoneration of the hereditaments charged therewith; with a proviso, "that if, before the expiration of the period for accumulation, the accumulated fund should be of sufficient amount for the purposes aforesaid, then the accumulation shall thereupon immediately cease." The testator also gave certain chattels to go as heir looms with the settled estates, and bequeathed 30,000*l.* for building a mansion-house upon the same. The testator died in 1826. The number of Lord B.'s younger children were such that 40,000*l.* would be raisable under the marriage settlement. In 1847, twenty-one years after the testator's death, the accumulated fund amounted to 35,622*l.*; at the time of the institution of this suit it amounted to 43,643*l.* Lord B. was still living, and had only appointed a small sum, by way of advancement, to one of his younger children:—

Held, first, upon the construction of the will, that the proviso as to the cesser of accumulation applied to the period of Lord B.'s lifetime, as well as to the twenty years from the testator's death.

Secondly, assuming this case to be within the 1st section of the Thellusson Act, 39 & 40 Geo. 3, c. 98, (reversing the decision below,) that the sum accumulated within the twenty-one years was, so soon as the 40,000*l.* was accumulated, a fund applicable to the payment of any of the younger children's portions which were then payable, and would be applicable to the rest of the portions when they should become payable; and that the latter part of the 1st section would be satisfied by giving the residuary legatees, the difference between the 35,622*l.* and the 40,000*l.*, which was the limit of accumulation.

Thirdly, (reversing the decision below,) that this was a case within the exception in the 2d section of the act, it being a provision for raising portions for children of a person taking an interest under the devise; and that the whole accumulation directed was valid.

Semble, contra the dicta of the court below — First, that the exception in the 2d section, as to accumulation for payment of debts, is not confined to the debts of the person directing the accumulation, but extends to a provision for payment of the debts of any person or persons; and it extends to past and future debts. Secondly, that to bring a case within the exception in the 2d section, it is not necessary that the parent of the portioned child should

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take an interest in the same real or personal estate, the income of which is directed to accumulate. And, *contra Bourne v. Buckton*, 2 Sim. N. S. 101; s. c. 9 Eng. Rep. 152, that it is not necessary that the parent should take an interest under the particular clause directing the accumulations; but that "such devise" means "such will."

In a "special case" under the 13 & 14 Vict. c. 35, various questions were propounded for the opinion of the court; but the Lord Chancellor refused to decide any, except the great question in the case.

THIS was an appeal from the decision of Sir G. J. Turner, late Vice-Chancellor, reported 16 Jur. 984; s. c. 13 Eng. Rep. 445; where the facts are fully stated. The facts sufficiently appear also upon the Lord Chancellor's judgment. There is one inaccuracy in the previous report, but which is not of much importance as affecting the decision. At p. 447, Eng. Rep., the report states that the testator gave "one moiety of his residuary personal estate to trustees, for the younger children of the present plaintiff, Lord Barrington, subject to the life interest in George, late Lord Barrington, and his wife." That was not so; it was given to trustees, upon trust, after the decease of the survivor of George, late Lord Barrington, and Elizabeth, his wife, "for all the children of the said George, Viscount Barrington, then born or thereafter to be born, but not an eldest son or only son."

W. P. Wood and *G. L. Russell*, for the appeal. The Vice-Chancellor decided that the trust for the accumulation was invalid beyond the twenty-one years from the death of the testator; and further, that the income thereafter to accrue should be paid to the residuary legatees until the accumulated fund should be applied in discharge of the portions of Lord Barrington's children. We submit, first, that the trust was a valid one for the whole period of accumulation, this being an exception under the 2d section of the *Thellusson Act*, 39 & 40 Geo. 3, c. 98. Secondly, that even should the court hold that the accumulation directed was excessive, yet that, according to the whole frame of the will, the sum properly accumulated ought at once to be applied to exonerate the Barrington estates from the charges created by Lord Barrington, particularly from the two sums of 523*l.* and 721*l.* already advanced to the children. First, we submit that the court will look at all the circumstances existing at the time of passing this statute, and at the preamble, to see what it was that was struck at. But we submit, that, even from the actual wording of the statute, there is sufficient to show that it only meant to prevent this, namely, the accumulation of a fund for an extreme period, for a foolish and vain purpose, as the creating of a large family property at a distant time, or for a mere capricious object. It is quite clear that here the 15,000*l.* was given by the testator as portions, even within the case of *Halford v. Staines*, 16 Sim. 488; and we submit that the case is clearly within the exception in the second section, for the donees are the children of a person taking an interest under the will. We submit that it cannot be right to say that the statute requires, that, to come within the second section, it should be necessary that the parent should take an interest in the very fund which is directed to be accumulated; as was said by Sir R. T. Kindersley, V. C., in *Bourne v. Buck-*

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ton, 2 Sim. (N. S.) 91; s. c. 9 Eng. Rep. 144. The words of the section are, "any interest under such conveyance, settlement, or devise." These latter words mean under the same instrument, not in the subject-matter of the particular gift; and we submit that your lordship will not limit the effect of these words further than the general scope and spirit of the act requires. But does not Lord Barrington take an interest in this very fund? Is it not to exonerate his property from charges? The other side may say, that if we are right, then the gift of any thing to the parent, a watch, or a horse, &c., would be sufficient; but one answer to that would be, that the court would have no difficulty in dealing with what would be a clear fraud upon the statute.

[LORD CHANCELLOR. The accumulation here is directed by the will; the question is, whether you take an interest under the will; your interest seems under the settlement.]

Our interest in the 15,000*l.* and its accumulations, is to have it applied at once in exoneration of our estate; we would have a right to file a bill to have this so applied.

[LORD CHANCELLOR. Lord Barrington's life estate could not be affected by the charge, except by his own act. No person could compel him to exercise his power of advancement.]

It was a duty, though not one which this court could compel. In lunacy this court does order advancement for children where there is a surplus.

[LORD CHANCELLOR. This court does what it thinks the lunatic, if sane, ought to have done.]

Next, the Vice-Chancellor says, "I find first a statutory determination of the accumulation, and then a statutory direction how the future income is to go, which gives the whole income to the residuary legatees during the life of Lord Barrington." We submit, there being a direction that the accumulation should be for Lord Barrington's life, and twenty-one years, with a proviso as to cesser of the accumulation, that there are these two limits to the accumulation, and that the real limit is when the accumulations amount to 40,000*l.* But supposing the court to be against us on these points, still Lord Barrington is in a condition to say, "At least, now apply a portion of the fund accumulated before the expiration of the twenty-one years to pay off the sums which were advanced to the children before the twenty-one years expired;" for the accumulation is complete when the statute stops it. [They cited *Griffith v. Vere*, 9 Ves. 127; *Evans v. Hillier*, 5 Cl. & Fin. 114-126; *O'Neill v. Lucas*, 2 Kee. 313; *Crawley v. Crawley*, 7 Sim. 427; and *M'Donald v. Bryce*, 2 Kee. 276.

Chandless and Green, for the residuary legatees. We submit that this is not a case within the exception as to portions. It is quite clear from the will that there was no intention on the part of the testator to benefit the children of Lord Barrington by this gift for accumulation; it was only given for the benefit of the Barrington estates upon which the portions were charged by the settlement. *Beech v. Lord St. Vincent*, 14 Jur. 731; *Bourne v. Buckton*, 2 Sim. (N. S.) 91, 96;

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s. c. 9 Eng. Rep. 144. We submit that the interest which the parent must take, to bring a case within the exception in the second section, is an interest in the very fund from which the accumulations are to arise, and that the Vice-Chancellor's reasoning on this point is decisive. (See 16 Jur. 987.) It is clear from the will of the testator that payment of the portions under the settlement was not contemplated by the testator until Lord Barrington's death, or until the accumulations amounted to 40,000*l.*; and as neither of these events has occurred, the statute having stopped the accumulations in 1847, we submit that the income of the accumulated fund must go to the residuary legatees until Lord Barrington's death.

[LORD CHANCELLOR, (after reading the latter part of the 1st section.) Would not both parts of the act of parliament be satisfied by holding, that when the act steps in and stops the accumulations, the accumulated sum belongs to the parties who would have been entitled to the whole accumulations, and that the "rents, issues, profits, and produce" of that from which the accumulations arose should go to the residuary legatees from the time whence the act stops the accumulations?]

In the cases there has never been taken any distinction between the income of the accumulations, and the interest of the sum from which the accumulations arose. [They also referred to *Jones v. Maggs*, 9 Hare, 605; s. c. 10 Eng. Rep. 159; *Eyre v. Marsden*, 2 Ke. 564; *Shaw v. Rhodes*, 1 My. & C. 135; and *Morgan v. Morgan*, 15 Jur. 319; s. c. 2 Eng. Rep. 35.]

Glass, for the trustees.

W. P. Wood, in reply.

LORD CHANCELLOR, (Lord St. Leonard's.) This case arises upon the will of the late Bishop of Durham, and involves very considerable questions upon the "Accumulation Act," as it is called, arising out of the *Thellusson* case. It appears that the family estates of the Barringtons had been settled to common uses, in strict settlement, to give the late Lord Barrington an estate for life, and then an estate for life to the present Lord Barrington; and a term of years was created for raising portions for the younger children of the marriage, and, in the events which have happened, 40,000*l.* has become payable. That sum, therefore, became a charge, but did not become absolutely raisable in the present Lord Barrington's lifetime, unless he directed it to be raised, so as to be a charge upon his life estate; and some portions of a small amount — 1,200*l.* or 1,300*l.*, I think — have been charged by him, and are, therefore, immediately raisable out of the Barrington estates; and those charges were made after the death of the Bishop of Durham. Now, the Bishop of Durham, by his will, having no power over the settled estates of the Barrington family, but meaning greatly to benefit that family, the late lord being his nephew, and the present lord his great nephew, made large provisions for those members of his family — the representatives, in fact, of his

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family; and he, amongst other things, gave chattels of considerable value as heir looms, to go with the settled estates; and he directed the sum of 30,000*l.* to be laid out in the erection of a mansion-house upon the settled estates; and by a clause, upon which the question arises, he provided a sum of 15,000*l.* for the purpose of relieving the settled estates from the portions to which they were liable under the settlement to which I have referred.

By his will he recites, that upon the settlement, and upon the marriage of his nephew, these estates were settled in the way to which I have alluded, so that there would be to be raised portions in certain events, either of 20,000*l.*, 30,000*l.*, or 40,000*l.*, as the case should happen. He then bequeathes to his executors the 15,000*l.*, in trust that they shall, within three calendar months, lay out those moneys, and accumulate all the interest and dividends during the life of his great nephew, the present lord; "or if his great nephew should depart this life within twenty years, to be computed from the testator's death, then the accumulation was to be continued for so long a period as with the time that should elapse in the lifetime of his said great nephew would make up the full term of twenty years, to be computed from his, the testator's death; and upon the completion of the accumulation aforesaid, the trustees were to stand possessed of the trust moneys and accumulations, in trust to apply the same, or a competent part thereof, in satisfaction and discharge of the portions so intended for the daughters and younger sons of his said great nephew, when and as the same should become payable, and in exoneration of the hereditaments charged therewith; and subject thereto, upon and for the several trusts, intents, and purposes," and so on, declared of his residuary personal estate. Then there was a proviso of great importance, by which he declared, "that if, before the expiration of the said period of accumulation, the accumulated fund should be of sufficient amount or value for answering the purposes aforesaid," which were for the payment of the 20,000*l.*, 30,000*l.*, or 40,000*l.*, "the accumulation should thereupon immediately cease."

Now, the first question which arises upon this will is, what is the true construction of it, altogether irrespective and independent of the *Thellusson Act*? The testator means the accumulation to go on, if it is necessary, during the life of Lord Barrington; but he has expressly provided, that if the money — not the 40,000*l.*, but the 20,000*l.*, the 30,000*l.*, or the 40,000*l.*, whichever it may be — payable under the settlement, should be accumulated before the expiration of that term, that then the accumulation should cease — the object would be answered. He did not mean an accumulation during the whole life — he had no object in that; but he meant accumulation for a particular period, in order to raise a particular charge. Well, then, he says, but if Lord Barrington should die before twenty years have expired, I mean, that, at all events, the accumulation shall go on for twenty years — nothing shall prevent it — if, the proviso again overrides that, that term shall be necessary in order to raise the money. Now, then, observe, in the first place, if it had happened that Lord Barrington had died within the twenty years after the death of the

bishop, and that the money had not then been accumulated, and supposing that the remaining time to make up the twenty years from the bishop's death would have been sufficient to accumulate the portions, what would have happened? Why, that the accumulations, whatever was the amount of them, that could be raised in that time, would have been an immediately available fund for the portions. It therefore was not necessary that 20,000*l.*, 30,000*l.*, or 40,000*l.*, should be actually raised, according to this testator's direction and intention. He wished it to be raised, if the time would allow; but he meant that whatever could be accumulated within that period should be a fund applicable, as far as it would go, to the portions; and then he has directed the portions to be paid "when and as the same respectively should become payable."

Now, let us look at what is the natural and proper construction of this will. Taking the proviso as a limitation, which it is, of the original and secondary direction in the will, the will is simply and plainly this — "I direct this accumulation to go on during the life of Lord Barrington, unless the portions shall be sooner accumulated." That is the direction. It is a limitation upon the former period, if the portions can be sooner accumulated. It does not matter what clause comes first or what clause comes last; you take the whole of it together. Then clearly, according to the intention, the accumulation is to cease. So, as I have already shown, if Lord Barrington died before the twenty years, and then you began to accumulate for the remainder of the twenty years — if you raised the portions sooner than the expiration of the twenty years, then that proviso again joins itself to the second alternative; and if the portions were raised within the twenty years, the accumulation would cease. Now, in that, therefore, there is nothing to contravene or touch the *Thellusson Act*. It is a case not within the prohibition of the first section; it is a question simply of intention upon the construction of this instrument. Now, looking at it in that way, it seems to me perfectly clear that the testator intended, that whatever fund could be raised within the limit of his will should be at once applicable to the payment of the portions. If 20,000*l.*, for example, had only been raisable, the money would have been raised within the legal limit, according to the intention, without touching the *Thellusson Act*. If the 30,000*l.* had become payable within the legal limit, as it has in point of fact, that sum would have been raisable for the portions of the children. They would have taken all their portions, under this provision of the will, without touching the *Thellusson Act*. As it has happened, Lord Barrington has lived longer than the twenty years, and therefore we get out of the direction of the testator in that respect; and he has lived longer than the twenty-one years, which brings the case, as regards that, within the *Thellusson Act*; and the 35,000*l.* odd, was raised during the twenty-one years allowed by the *Thellusson Act*. And then the question is, what is to be the decision or determination of the court in regard to that state of circumstances? That the 35,000*l.* odd, has been properly and legally raised, even within the prohibition of the *Thellusson Act*, admits of no doubt; and that the 35,000*l.* is applicable to the por-

tions, admits of no doubt; and the only question is, when is it applicable?

I confess, that, looking at it in a common-sense view, I should say it was applicable to the portions when and as they became payable, for the testator himself has provided for that: he says, when and as they become "payable." But then it is said by the learned Vice-Chancellor, whose judgment is entitled to very great attention — and, indeed, I have been attending to it very attentively, independently of the respect I have for his learning and judgment — it is an exceedingly elaborately reasoned judgment, and entitled to very great attention; — the Vice-Chancellor puts it, as I understand it, in this way: He says that, looking at the nature of the trust and the statute combined, the portions cannot be payable during the life of Lord Barrington; and for this reason, because the direction is, to accumulate during the whole of the life of Lord Barrington; and although the 40,000*l.* cannot be raised, according to the statute and according to the will, within the life of Lord Barrington, yet he says that the accumulation has been stopped by the operation of the statute, and that the event provided for has not happened; that therefore, the accumulation being stopped by the statute, the whole fund is directed by the statute to go in a different direction, and consequently that the 35,000*l.* will go in that direction pointed out by the statute, and cannot be applied during Lord Barrington's life to the payment of the portions.

It would be very much to be regretted if that were the true construction of the will and of the statute, because it would defeat every intention which the bishop had, and which he has clearly expressed, and expressed within the legal limit; and there is nothing in the statute which is properly struck at by a contrary construction. If we are to consider whether the 35,000*l.* could now be applied to the payment of the portions, I want to know the intention. I have already shown that the intention clearly was, that the lesser sum, if it were to be raised within the period allowed by law, independent of the statute, would be applicable at once. Then, the statute only stopping the accumulation, and directing the application so long as the accumulation should be directed contrary to the act, all we have got to see is, what is the duration of time pending which the accumulation is directed contrary to the act. It has been decided by the cases of *Griffith v. Vere*, 9 Ves. 127; and *Longdon v. Simson*, 12 Ves. 295; that although the act says that these directions shall be null and void, they are only made null and void *pro tanto*; for if it is life estate, we know it is good for twenty-one years, if the life exceeds the twenty-one years; if for twenty-four years, it is good for the twenty-one years. That is quite clear, and there ought not to be any doubt upon that point, because, although the statute says that it shall be null and void, it goes on to tell you what the consequence will be — namely, that the fund shall only go over to persons who would have been entitled during the time that the accumulation has been directed contrary to the intention of the act.

I have given this point a great deal of consideration, out of the

respect which I feel for the judgment of the court below ; and I cannot bring my mind to see where the difficulty is in holding this to be at once a fund applicable to the portions ; because, although the statute stops the accumulation, and directs that the interest shall go to the other parties during the time that the testator has contravened the provisions of the act, yet it is not to go for any more time, and the contravention of the act does not prevent you from measuring the time which is exceeded. Now, what is the measure of time that is exceeded ? Why, the time it takes after the 35,000*l.* was actually raised till the 40,000*l.* was raised. As a measure of time, therefore, I have got a perfect rule. The money, as it happens, has been accumulated. If it had not, I could have directed a computation, and there would have been no difficulty in ascertaining how far this act of parliament was contravened. Well, then, if the testator did not intend, as clearly he did not intend, that the accumulation should go on for the whole life of Lord Barrington, if the portions could be sooner raised, and if the act of parliament steps in and cuts down the raising of that beyond the 35,000*l.*, and if I give to the act of parliament its full operation from the raising of the 35,000*l.* to the raising of the 40,000*l.*, should I not accomplish every intention which this testator had that the law will enable me to carry into effect, and put a sensible, a sound, and rational construction upon the act of parliament, by saying that the residuary legatees are to take the accumulations from the end of the twenty-one years until the time when the whole fund would amount to 40,000*l.* ? I give to the act of parliament its whole force, without any strain or pressure. I take from it no operation which the words naturally and properly and legally give to it, and yet I give effect to the intention. I am, therefore, clearly of opinion, with great deference to a contrary authority, that, as regards this first point, if the case depends upon that, which is a very material point to be considered, the 35,000*l.*, when and as soon as the 40,000*l.* was raised, became a fund applicable, in the first instance, to pay the portions of the children of Lord Barrington already payable, and would equally be a fund applicable for the payment of the rest of the portions when they become payable. In the mean time, of course, the interest of the fund between the raising of the 35,000*l.* and the 40,000*l.* will go, according to the directions of the will, to the residuary legatees. This is the construction which I feel bound to put upon the 1st section of the act.

Then comes the very important question, what is the operation of the second section of the statute ? Does that section or not include this particular case ? Now, there has been a great deal of difficulty always felt in putting a sound construction upon that section of the statute. It was introduced into the bill, as the late Mr. Hargreaves tells us, in the House of Commons ; but it must have gone back to the House of Lords : it was the Chancellor's bill, and no subject has ever been more considered ; and although nobody can deny that it is very vaguely and loosely expressed, yet it must be conceded, I think, that the greatest authorities of that day considered it sufficiently expressed what their intention was. That the words are inaccurate, there is no doubt ; but they do not admit of very great doubt, I think, in their

construction. The proviso is in these words — “that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed.” Now, in order to get at the true construction of this section, as it bears upon the present case, we have to consider what the meaning of the former provision is — “that nothing shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons.”

I observe that the Vice-Chancellor was of opinion, and rested upon that in coming to the conclusion that he did on the remaining part of the section, that the words “or other person or persons,” having reference to the first section, did not mean that a testator or grantor could provide for the debts of anybody but himself, but that it meant that any other person or persons might provide for his or their own debts. That is a conclusion to which I cannot come. I am of opinion that the true construction of the act is, that this is all one sentence. That is proved to my satisfaction by the way in which the subsequent parts of the section are framed — “that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons.” And you will find that in the same way in the other branches there is no break. What is the true construction of it? You may provide for the debts of yourself or anybody else, by your will, within the old limit. It is a praiseworthy thing to pay debts, but you are not likely to provide gratuitously for the debts of any indifferent person, but you are very likely to do what thousands of people have done, provide for the debts of their fathers when they have not been able to pay their own debts, or, what more frequently happens, perhaps, for the debts of their sons, when they have not been able to pay them themselves; and the legislature meant that a man should, within the limit allowed by law, be able not only to provide for his own debts, but the debts of such other persons as he should think fit to provide for; it being perfectly certain, from the nature of the charge itself, that it was a power which it would not be very dangerous to intrust to anybody. I think that is the true construction of the act.

It is equally clear that it goes to past debts as well as to future debts. That admits of no doubt. Nobody will deny that it must relate to past debts; and nobody can deny that a man may, by his will, under the act of parliament, provide generally for his debts, which must include his future debts. Now, that being so, removes one of the grounds upon which the learned Vice-Chancellor relied. But then it goes on, “or to any provision for raising portions for any child or children of any grantor, settlor, or devisor.” Now, to stop there, the Vice-Chancellor of England decided, in the case of *Halford v. Staines*, 16 Sim. 486, that that included only portions already charged.

Now, that it does include portions already charged, not only is decided, but nobody can doubt it as regards a grantor. Nobody can doubt that he would have the power to provide for the portions which he had already created. What could be more reasonable — what is more reasonable, than that a man, having settled his family estate, and also charged it with portions for his younger children, should, if he live long enough to accumulate, by saving a considerable sum of money, provide for the release and disincumberment of his settled estate? This gave him the power of doing so by accumulation, beyond all doubt.

As regards a grantor, settlor, or deviser, there is no doubt, therefore, that it would include portions already created, as well as future portions; otherwise I should rather agree, that, on every meaning of the words, "for raising portions," they rather look to future portions than to portions already created. There can be no doubt that that has been settled by judicial determination; that it has been settled over and over again, and, as I think, perfectly right. There is no break in this clause, any more than there was in the other, between the "debts of any grantor, deviser, or settlor, or other person or persons." You will observe that the whole sentence that I am going to read is governed by these words, "or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children" — not again taking up "or any provision for raising portions" anew, but governed by these words, "of any person taking any interest under any such conveyance, settlement, or devise." I think, therefore, it is perfectly clear, that whatever a grantor or settlor may do with regard to his own children, he could do with regard to the children of any other person, as regards past portions or future portions; because there is no distinction between them, except that the persons whose children may have portions provided for them by a grantor, settlor, or deviser, must be persons who take an interest under "any such conveyance, settlement, or devise." I think it, therefore, perfectly clear that what a grantor may do with regard to his own children — I am speaking now of past or future portions — he may equally do, under this act of parliament, with regard to the children of any other person who comes within this description. Then this question arises — upon which the whole depends — what is the meaning of the words "child or children of any person taking any interest under any such conveyance, settlement, or devise?"

Now, it has been repeatedly observed that these words are very inaccurate — "under any such conveyance, settlement, or devise;" and certainly they are; but they admit, I think, of an easy interpretation. It would be difficult to say where you are to find the antecedent to these words, "such conveyance, settlement, or devise," strictly speaking. But when the first part of the section has spoken of a man making provision by a gift, or a settlement, or a devise, calling him a "grantor, a settlor, or a deviser" — that is, a disposition by will — where is the difficulty, considering the mind of the framer has passed on to the instrument itself, by which the grantor, settlor, or deviser does make a provision for the portions? It seems not accu-

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rate; it may be ambiguous, but it is not difficult to construe. The mind has passed on to the instrument by which the grantor, settlor, or devisor, before spoken of, is supposed to have made the provision. Now, it has been said by another learned Vice-Chancellor, (Sir R. T. Kindersley, in *Bourne v. Buckton*, 2 Sim. N. S. 101; s. c. 9 Eng. Rep. 144,) that the words "any such conveyance, settlement, or devise," make it necessary that the gift to the person who is to take an interest under the conveyance, settlement, or devise, must be by the very clause which creates the portion. Now, see what the effect of that would be. Supposing it to be necessary, under this clause, that the parent should take an interest in the very property out of which portions are to be raised, what would be said to this — an estate for life given by the first part of the will to a person, and then by the latter part of that will portions directed to be raised for his children out of that very estate? Why, that would be directly within the intention and words of the act of parliament, in the strictest construction; and to say, because the estate for life was found in one part of the will, and a direction to raise the portions in another part of the will, that he did not take under the devise, is a most violent construction, not warranted by the words, and clearly contrary to what must have been the intention of the act of parliament.

Now, there is no magic in the word "devise." "Devise" clearly means a disposition by will, "under any conveyance, settlement, or devise." I suppose a "conveyance" is clear enough. If, then, a man takes under a "conveyance," does it signify in what part of the deed he finds it? It cannot. A settlement — can it matter where it is found, as long as he has an interest in that settlement? A devise — can it possibly matter in what part of the instrument is found the particular interest which is created? It can not matter. But then the great question at last comes to this — what is the interest which a person, whose children are to be provided for, is to take under "any such conveyance, settlement or devise?" Now, the Vice-Chancellor has held, that the interest which a person must take under "any conveyance, settlement, or devise," must be an interest in the very property which is directed to be accumulated, as I understand it, or out of which that property is to spring, in order to bring you within this section of the act of parliament. Now, I find no such words in this act of parliament; I can collect no such intention. Nothing could have been so easy as to have expressed the intention, if that intention had actually existed. When parliament intended to provide for a case in words of that sort, you will find in the first part of the section that they particularly speak of the person entitled to the rents and profits. Speaking of the time which is allowed, or beyond which there is a prohibition, they say, it may be "during the minority or respective minorities of any person or persons in *ventre sa mere* at the time of the death of such grantor, devisor, or settlor, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulation, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the inte-

rest, dividends, and annual produce so directed to be accumulated." When, therefore, the legislature meant to provide for the case of a person being entitled to the actual fund, they knew how to express their intention; and therefore, when I find in this section that it is not to prohibit any provision for any child or children of any person taking an interest under any such conveyance, settlement, or devise, I am compelled to say that the legislature meant what it has expressed, that nobody's child should be provided for unless you give an interest to the parent. Is there any thing irrational in that? or does it require any emendation or addition in order to give effect to it? Can any thing be more rational? They were forced, under this proviso, to give some definition of the parents of the children of strangers. As everybody of course is the child of somebody else, you would have had it apply to the whole world, unless you had limited and defined who the parent was from whom the children were to spring, not being "the children of any grantor, settlor, or devisor." Then the legislature said this, and said it very sensibly, "If you make the father an object of your bounty upon the face of your will, you may by that same will accumulate a fund, within the limit allowed by law, for the children of that party. We shall not permit you to provide for everybody in this way; but if a man is the object of your bounty, we are then content that the power which you had before by law shall remain, to provide by accumulation for the children of that person." It does not exclude the case; on the contrary, that is the highest case you can put of a man having an estate for life, for example, in a property given to him by will, the portions being directed to be raised out of that estate for his children. That is the highest case; but does it only apply to that case? Where are the words? I can only collect the intention from the expression; but there is no such expression. It is "any interest," and not in the particular property. There is no limit as to amount; you are yourself to be the judge of the amount, and of the extent of your bounty. That defines who are to be the children of "other persons," in some such way as was absolutely necessary. I think, therefore, that I do no violence to the words, and I do not intend to carry the words beyond their plain and natural import.

The subjects of this country had a right by law to accumulate within the limits which are here left at large. It was considered dangerous that that limit should in all cases be allowed to remain; it was therefore restricted by the act of parliament; but the same act of parliament tells you the cases in which it should not apply. And then why am I to strain beyond the words of the act of parliament, in order not only to effect an intention, (which I cannot collect,) but in order to do something which may be considered consistent with the usual and common course of things? If they had intended it, they would have expressed it; but there is no such expression, and I cannot collect any such intention. Now, in construing this act of parliament, I profess to do no violence whatever to the terms of it. I am putting a strict construction upon it; I am giving to every word its natural and proper import, but I am importing no new words into it.

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They who drew this act of parliament and passed it, knew better what they meant and intended than I can possibly conjecture. I mean to do nothing by conjecture; I give to every word its full meaning; I strain no words to meet this particular case; I introduce no words in order to strike at this particular case.

Now, after the great attention I have given to this case, and notwithstanding the very great respect I feel for the learned Vice-Chancellor's very elaborate judgment, my opinion upon the whole of this act of parliament, with reference to this settlement, is, that this is a case within the exception, and therefore, that these portions are properly raisable, as being raised within the time limited by law, independent of the statute. Now, as to the authorities, I will first refer to them before I part with the case. I do not see that any of them bear very closely upon it, but I have looked into the different cases that have been referred to. There was one case, as to the interest which a party was to take, upon which I have already given my opinion—the case of *Eyre v. Marsden*, 2 Beav. 527. It was a case before Lord Langdale, and it was held not to be within the proviso. The grantor's children, for whose benefit the accumulation was directed, were not the children of any person who took an interest under the will; and Lord Langdale, besides, held that the accumulations were not for raising portions, properly so called. Some of the children who took interests had small annuities given to them for life out of the fund. Now, independently of the reasons given there by Lord Langdale—as to which I express no opinion—if, in *Eyre v. Marsden*, the parent of all the children had been provided for by even small annuities out of the fund, my strong and clear opinion would have been that that was a case within the proviso, for the reasons which I have already given.

In *Morgan v. Morgan*, 15 Jur. 319; s. c. 6 Eng. Rep. 130, before Sir J. L. Knight Bruce, when Vice-Chancellor, there were specific legacies of considerable value given to a mother, and then legacies to the daughters of 5,000*l.* each on their marriage, with all accumulations of interest thereon from the time of the testator's death, and it was held not to be within the exception. It was a specific legacy to the mother, and general legacies to the daughters. There is a very short judgment indeed. I do not know whether it is accurately reported, but it is so short that I could not get at the grounds of the learned judge's opinion; but that goes entirely upon a ground that I need not disturb, as it is not before me; but it does not, I think, touch the question, or affect the view I take of this case.

Then, there is the case of *Shaw v. Rhodes*, 1 My. & C. 135, before the Lords Commissioners. That case has been referred to, and relied upon in subsequent cases—the passage in which Bosanquet, J., who sat as one of the commissioners who assisted Lord Cottenham in the decision of the case, seemed to fancy that the gift was not within the statute. He says, “But independently of this answer”—about the children being illegitimate, and therefore, the parent was not provided for, which was not a fact before the court—“But independently of this answer, I do not think that the case falls within the meaning of

the exception. Where the whole rents and profits are given in the first place to persons during the lives of their parents, with the exception of small annuities only, to be paid thereout to the parents themselves, for their own lives, and a gift to the same persons after the death of their parents is superadded, to be paid out of the subsequent rents and profits, I cannot think that the superadded gift is to be considered, within the meaning of the statute, in the nature of a portion to the children of persons taking an interest under the devise." I think he was looking there rather to what was a portion, than to what was the nature of the interest of the father of the children. It amounts to nothing more than an *obiter dictum*; but I do not think he was giving any opinion as to what was a sufficient interest in the parent, but he was looking to see what amounted to portions to the children; because cases may arise — nobody can doubt that an interest may be given to the parent of the children — in which, although an interest be given to the parent, and some provision afterwards made for the children, yet that may not be made in the way of portions, so as to bring them within the second exceptions.

In the case before me they are clearly portions, and therefore, I am relieved from troubling myself with those cases. Now, Lord Cottenham, in giving his judgment, does not even refer once to the second exception, and therefore it was not considered. The case was undoubtedly within it. When the case came on in the House of Lords, the judgment was not a very satisfactory one, because Lord Cottenham simply refers to what he had before said. During the course of the argument this was observed, which has been referred to. The counsel were arguing as to the term, "any interest." Counsel said — "It was, indeed, impossible to conceive that the legislature could have meant to sanction an accumulation like the present, made under the pretence, that portions were to be thereby provided for the children of a person taking an interest under the devise. To give such a latitude of interpretation, to the language of the exception, would be to open a wide door to evasion and fraud, and virtually to repeal the act." Lord Lyndhurst said — "I think the meaning of 'any interest' is any interest, however minute." Then counsel said — "The act would be nugatory if the interest is of such a small amount as would bring the accumulation within the exception," &c. No opinion is given upon that point; but my Lord Chancellor contented himself with referring to the opinion which he had before given, which did not even glance at this question. But as far as this opinion went during the argument, there is no doubt that the opinions of those two law lords were, that however small the sum was, if there was a gift to the parent of the children, and they were portions, that was an interest which would bring the case within the exception of the act of parliament.

There is one other case, of *Jones v. Maggs*, 9 Hare, 345; s. c. 10 Eng. Rep. 159, before the same learned judge from whose decision this case is appealed, and that was decided on the ground that the legacy was not a portion. I do not touch any of those cases, because this is a case clearly in which the sums provided are portions, and are not mere legacies.

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Upon the whole, therefore, I think that this case is really untouched by decisions to which I am bound to pay any real deference, independently of the opinion of the learned judge of the court below. After the most anxious consideration of the case, I have come, certainly, in my own mind, to the very clear conclusion that the case falls within the second exception of the act of parliament; that therefore the portions have been regularly and properly raised, and are therefore, to be applied in the way in which the testator directed; that is, so much of the fund as was directed to be raised as can be properly now applied for payment of portions already directed to be raised, must be paid in satisfaction of those charges; and at the same time, as other portions shall be directed to be raised to increase the fund as it is wanted, they must be applied in the same way; but beyond that the fund must take its course. It will be like a common legacy to provide for portions not payable at the time, with a residuary gift until the fund is wanted; the whole fund being raised which the testator intended, the interest from that time will go to the residuary legatees. I must, therefore, reverse the decision of the Vice-Chancellor, and make the declaration I have.

W. P. Wood was about to suggest what, consistently with his lordship's judgment, should be the answers to the questions raised by the special case, when

THE LORD CHANCELLOR said — I will make just an observation on that matter. The act of parliament has allowed you to come here with a special case. I do not consider myself bound to answer every question which a gentleman may think proper to put. I am not the judge to answer those questions. I answer that which is the great question — which meets the merits of the case; and that I have already disposed of; but as to the exact terms in which you draw the case, I do not think I am bound to answer every question solicitors may put. I have had so much experience in cases laid before counsel, that they want every possible event that can happen answered, and desire an opinion upon it, although there is no necessity for it. I should answer generally to all those questions, if there were five hundred. What I have stated, is my opinion of the act of parliament bearing upon this case.

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MORGAN v. MILMAN.¹

January 21, 1853.

Power, defective Execution of — Contract for Sale — Arbitrator not named — Specific Performance refused — Remainder-men.

A and B, (father and son,) being first and second tenants for life of settled estates, with a joint power of general appointment by deed, agreed with a railway company for the sale of certain parts of the estates, the amount of compensation to be settled "either by arbitration or a jury, as A shall choose." Subsequently other parts of the estates were agreed to be sold to the company, but the price was not fixed. The company paid a sum of money to A and B upon their receipt, in which it was stated that it was paid "on account of the compensation money to be ultimately fixed, and to be paid by the said company, in respect of the lands, part of our estates, required for the S. W. Railway Company." The company took possession of the several pieces of land, and proceeded with their works. A died before any thing further was done, and without having chosen by which means the compensation should be settled. Upon a bill by B for specific performance:—

Held, affirming the decision below, that this was not such a contract as this court could enforce, and that it would not aid the defective execution of the power.

Per the Lord Chancellor. Distinction in principle between this court aiding the defective execution of a power on the application of a purchaser for value, and on the application of the tenant for life, as against the remainder-men.

Where the contract stipulates that the price shall be ascertained by arbitration, this court cannot interfere where the price is not so ascertained.

Quære, whether this court will aid a defective execution of a power in a case, where the purchaser has a legislative power of taking the lands, and the assistance of the court is not sought by him, but by the donee of the power, to defeat the parties in remainder?

THIS was an appeal by the plaintiff, Sir Charles Morgan Robinson Morgan, from the decision of Sir G. J. Turner, when Vice-Chancellor. The case is reported 16 Jur. 755, s. c. 13 Eng. Rep. 312, but the facts require to be more fully stated. The bill set out an indenture of appointment, release, and settlement, dated the 26th November, 1844, made between the late Sir Charles Morgan and the plaintiff, his son, of the first part, the defendants F. M. Milman and C. O. S. Morgan of the second part, and H. O. Owen and C. F. R. Laselles of the third part, whereby large estates, including those parts which were the subject of this suit, were conveyed to the defendants, F. M. Milman and C. O. S. Morgan and their heirs, to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisos, agreements, and declarations, as the said Sir Charles Morgan and the plaintiff, by any deed or deeds legally executed, should from time to time, or at any time, jointly direct, limit, or appoint; and subject thereto, to the use of Sir Charles Morgan, for life; remainder to the defendants, F. M. Milman and C. O. S. Morgan, upon trust, to preserve contingent remainders; remainder to the plaintiff for life; remainder to trustees, to preserve; remainder to the defendants, the first, second, and other sons of the plaintiff, successively,

¹ 17 Jur. 193.

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in strict settlement: and by the said deed it was, amongst other things, provided, that it should be lawful for the said defendants, F. M. Milman and C. O. S. Morgan, with the consent of the said Sir Charles Morgan, or other the person who should for the time being be entitled to the first estate of freehold in the hereditaments thereby limited, to agree with any canal, railway, or other company, or projected company, as to the amount of consideration to be paid for or in respect of any of the hereditaments, by the said indenture limited in strict settlement, which such company should require, and as to any compensation for severance of lands, and for any injury or damage to the settled estates, &c., and generally to agree to all such provisions as should be thought necessary for the protection of the said settled estates in consequence of the works of any such company, or the purposes thereof; and that their receipts, or the receipt of the survivor of them, should be a sufficient discharge for all moneys payable in consequence of such arrangements with such companies as aforesaid. The bill then stated the acts of parliament by which the South Wales Railway Company was incorporated, and empowered to take the lands in question; the first of which acts incorporated into it the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

The bill then stated, that in the month of December, 1845, the said Sir Charles Morgan instructed his solicitor, Mr. John Burley, to undertake and manage the necessary negotiation with the said company for the lands they should require for the purposes of the said undertaking; and he expressed his intention, with the concurrence of the plaintiff, to convey to the said company such portions of the said lands as they should require to take, by means of the exercise of the said joint power of appointment vested in him, the said Sir Charles Morgan, and the plaintiff, under and by virtue of the said settlement; and the plaintiff undertook and agreed to concur in the exercise of the same power for such purposes. That in the month of March, 1846, the same company served on Sir Charles Morgan and his agents the usual notices of their desire to take such parts of the lands and premises as are comprised in the first part of the said schedule. That immediately on the receipt of such notices, Mr. T. S. Woolley was appointed, by the said Sir Charles Morgan and the plaintiff, to value the lands required by the said company, and was by them fully authorized to treat with the surveyor of the said company for the sale of any other lands required for the said railway which were comprised in the said settlement. That afterwards, and before the 1st June, 1846, the said T. S. Woolley, as the agent and on behalf of the said Sir Charles Morgan and the plaintiff, and the agents of the said company lawfully authorized for that purpose on behalf of the said company, agreed for the sale by the said Sir Charles Morgan and the plaintiff to the said company, and for the purchase by the said company, of the residue of the said pieces or parcels of land comprised in the said first part of the said schedule, which were not included in the notices served by the said company as aforesaid, for the purposes

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of the said railway. That before the said T. S. Woolley and the agents of the said company had finally settled the amount to be paid by the said company for the lands and premises comprised in the first part of the said schedule, the solicitor of Sir Charles Morgan and the plaintiff wrote to the solicitors of the said company a letter in the following terms: — "Lincoln's-inn, April 16, 1846. — South Wales Railway. — Sir Charles Morgan's lands. — Gentlemen, — The surveyor of Sir Charles and the company are now arranging as to the value, &c.; and as the purchase-money is to be either paid or deposited before possession is taken, I should wish to have an arrangement entered into in regard to the title which the company will require to be shown. The title of Sir Charles Morgan to the estates in Monmouth and Glamorgan, through parts of which the above railway passes, stands thus: — By a settlement executed in November, 1844, those estates were, under the powers of a former settlement, executed in 1814, appointed, subject to the family and other charges therein, to the following uses, namely, to such uses as Sir Charles and Mr. Morgan should by deed jointly appoint; and in default of and until appointment, to the use of Sir Charles for life, with remainders to Mr. Morgan and his sons for their respective lives, with remainders over to their issue in tail; so that under the last settlement Sir Charles and Mr. Morgan can appoint any of the lands required by the company as absolute owners of the fee. The estates in the above counties, above the family and other charges, are of great value, and I hope therefore that there will be no objection to Sir Charles and Mr. Morgan receiving the purchase-money without it being requisite to obtain the consent of any mortgagee thereto. I shall be obliged by hearing from you as soon as possible what course you will adopt, as I shall then know what abstract of title to prepare." That previously to the 30th June, 1846, T. S. Woolley, as such agent as aforesaid, had valued the lands and premises comprised in the said first part of the said schedule at 8,000*l.*; and on the 30th June, 1846, the said company offered the sum of 7,500*l.* for the same, which offer was refused by and on the part of the said Sir Charles Morgan and the plaintiff; and inasmuch as the said company required possession of the said lands, or some part thereof, for the purposes of the said undertaking, the said company agreed to deposit the sum of 8,000*l.*, as after mentioned, to secure the payment of the purchase-money for the same lands and premises. That on the 30th July, 1846, the following agreement in writing was signed in duplicate by the solicitor for and on behalf of the said Sir Charles Morgan and the plaintiff, and the secretary of the said company, on behalf of the said company: — "Sir Charles Morgan, Bart., and the South Wales Railway Company. — Memorandum. — The amount claimed by Sir Charles Morgan (8,000*l.*) for and in respect of the 26a. Or. 6p. of land required by the company, in the parishes of Christchurch, St. Woollos, Bas-saleg, and St. Bride's, in the county of Monmouth, to be deposited in the bank of Messrs. Glyn, in the joint names of John Burley, Esq., and Charles Russell, Esq., M. P., as security for and until the payment by the company of the sum which shall be awarded or agreed

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upon. On this deposit being made, possession to be given to the company of the land, the company paying interest at the rate of 4*l*. per cent. on the sum to be so awarded or agreed upon, from the time of such possession; the company within one month from such possession to proceed, without any delay, to get the amount of compensation settled, either by arbitration or a jury, as Sir Charles Morgan shall choose." Subsequently the company entered into a treaty with the agent of Sir Charles Morgan and the plaintiff for the purchase of other parts of the settled estates required for the purposes of the railway, included in the second and third part of the schedule, but they were unable to agree upon the exact terms, Sir Charles Morgan and the plaintiff requiring 7,500*l*. for the extra parts, making in all 15,500*l*., and the company offering to give 14,000*l*. The bill then stated, that on the 24th September, 1846, the solicitor of Sir Charles Morgan and the plaintiff wrote to the company, asking whether they had any objection to pay over to Sir Charles Morgan and the plaintiff a portion of the purchase-money for their use, stating, "The 8,000*l*. deposited is the amount I now require for Sir Charles. . . . The sum claimed for the other lands will be deposited by the directors in the usual way, after which the total amount of the compensation can be decided upon by reference or a jury." In reply to that, the company said, "It will be better to let the 8,000*l*. already deposited stand as it is; but on any day from Monday, the 28th instant, inclusive, that you will be good enough to bring me a receipt from Sir Charles and Mr. Morgan for 7,500*l*., the balance of the 15,500*l*. claimed by Sir Charles, I shall be happy to hand you a check for the amount, on account of the whole payment to be made for Sir Charles's land, as may be determined hereafter." The following receipt was accordingly signed by Sir Charles Morgan and the plaintiff:—"30th September, 1846. — Received this day of the South Wales Railway Company the sum of 7,500*l*. on account of the compensation money to be ultimately fixed, and to be paid by the said company, in respect of the lands, part of our estates, required for the South Wales Railway Company." That sum was accordingly paid to Messrs. Coutts & Co. to the account of Sir Charles Morgan. On the 5th December, 1846, and before any thing further was done in the matter, Sir Charles Morgan died, having made a will, and appointed the plaintiff sole executor of it, which he had since proved. After the death of Sir Charles, the company served notices upon the plaintiff of their intention to take other lands described in the fourth part of the schedule.

The bill then stated, that the company had agreed to pay the sum of 20,000*l*. for all the lands comprised in the schedule; and that, by a fair and proper apportionment of that sum, the sum of 15,366*l*. 5*s*. is attributable to the lands comprised in the first, second, and third parts of the schedule, and the sum of 4,633*l*. 15*s*. attributable to the lands comprised in the fourth part of the schedule. The bill alleged, that by reason of the death of Sir Charles Morgan it became impossible to carry into effect the intended execution of the said joint power of appointment, but that the same ought, so far as regards the lands and premises comprised in the said first, second, and third parts of the

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said schedule; to be treated and considered as having been conclusively agreed to be executed; and that the said defendants, F. M. Milman and C. O. S. Morgan, ought to be directed to concur with the plaintiff in the conveyance to the said company of the lands comprised in the first, second, and third parts of the schedule; and that the purchase-money for the same remaining to be paid, after giving credit for the said sum of 7,500*l.* so paid, ought to be paid to the plaintiff as the executor of the said Sir Charles Morgan, the plaintiff for such purposes waiving any right he might have to any of such purchase-moneys in his individual character. The bill prayed a declaration accordingly, and that the defendants, the railway company, might be decreed specifically to perform their contract, and that the defendants, F. M. Milman and C. O. S. Morgan, might be decreed to concur with the plaintiff and all other necessary parties in conveying to the company the lands comprised in the first, second, and third parts of the schedule. The facts, as above stated, were proved in evidence. The company were willing to act as the court should direct, but declined to complete without the sanction of the court. The question lay between the plaintiff, as the executor of Sir Charles Morgan, and the parties entitled in remainder. If the execution of the power should be assisted by the court, the consideration for the lands comprised in the first, second, and third parts of the schedule would belong to the plaintiff, as executor; if the execution of the power should not be aided, it would go to the defendants, F. M. Milman and C. O. S. Morgan, the trustees, to be laid out in other lands to be settled to the uses of the settlement. The Vice-Chancellor held, that the power was not executed, and that this court would not aid the execution.

Rolt, Elmsley, and J. T. Woolley, in support of the appeal. We submit that the lands in the first, second, and third parts of the schedule were duly sold, in pursuance of the power, and that the parties in remainder are bound; that, in fact, there was an equitable exercise of the power for the benefit of the late Sir Charles Morgan. We submit that it was not necessary to enter into any contract as to how the money was to be applied; it is only necessary for us to show that there was a binding contract in writing between Sir Charles and Mr. Morgan with the company; or, if not in writing, that there was, as in the present case, a parol one, followed by payment of the purchase money, and possession and user of the land.

[LORD CHANCELLOR. How can there be a sale without a price fixed, or unless there be a means fixed whereby that price can be rendered certain? Did Sir Charles Morgan decide by which mode, whether by arbitration or a jury, the price was to be fixed?]

No; but that was not a matter in which it was necessary that a personal discretion should be exercised. In the letter of Sir Charles's solicitor to the company, asking for payment of part of the purchase-money, he says, "The total amount of the compensation money can be decided upon by reference or a jury;" and then, in answer to that, the secretary of the company writes, "I shall be happy to hand you a check for the amount on account of the whole payment to be made

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for Sir Charles's land, as may be determined hereafter." We submit that the mere circumstance that Sir Charles died before electing between an arbitrator or a jury is of no consequence; that was a mere matter of detail; and we submit that neither Sir Charles nor Mr. Morgan could have resisted the performance of the contract.

[KNIGHT BRUCE, L. J. Have you any case where, upon a contract to sell an estate, the price to be fixed by arbitration or some other means, but the persons to fix the price are not named, the court has interfered and said, "Here is a contract, and we will intervene, and fix the price?" In *Blundell v. Brettargh*, 17 Ves. 232, the arbitrators were named, but in the case I suggest no person is named.]

If you have a case where, from the terms of the agreement, the arbitrator was to be named by the vendor, we submit that the death of the vendor would not prevent the appointment of the arbitrator, no more than it could put an end to the whole contract; the heir at law might appoint the arbitrator. Then does the circumstance of its being doubtful whether the price was to be fixed by a jury or by an arbitrator make any difference? This option was, in effect, a right, not a mere discretion, that was given to the vendor—it was a part of the consideration.

[KNIGHT BRUCE, L. J. Suppose that the late Sir Charles Morgan was now alive, and that the price had not been agreed upon, and both he and the plaintiff refused to do any thing, and the railway company filed a bill for specific performance, what would have been the decree which you think ought to have been made?]

A decree to elect, by which mode he desired to proceed to have the price fixed.

[KNIGHT BRUCE, L. J. You cannot compel a man to name an arbitrator.]

Parties will not be allowed in that manner to get out of their contract. The company might as well refuse to pay the purchase-money as the vendor to refuse to make his election. *Blundell v. Brettargh* has nothing to do with this case, for there it was considered a personal discretion. We submit that the true doctrine of this court is, that even a parol agreement by a donee of a power to execute the power, followed by part performance, is a good contract. *Gregory v. Mighell*, 18 Ves. 328; *Morse v. Merest*, 6 Mad. 26; *Bloye v. Sutton*, 3 Mer. 237; *Dowell v. Dew*, 1 Y. & C. C. C. 345; and an unreported case of *Wright v. Woodhead*, before Turner, V. C. Here we have written documents, which, coupled with the parol evidence and part performance, clearly make out an agreement to sell and to execute the power.

[KNIGHT BRUCE, L. J. Has there ever been a case of a decree for specific performance, upon the ground of part performance of a contract for the purchase of several lots, by taking possession of one distinct part of the estate?]

We submit that, as to part performance in connection with the written contract, the court will lay the several written documents side by side, and so construe them as to explain the act of part performance. *Saunders v. Jackson*, 2 B. & P. 238.

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Glasse and Milman appeared for the trustees of the settlement and the remainder-men; and

Osborne, for the company; but they were not heard.

LORD CHANCELLOR, (Lord Cranworth.) I do not think, Mr. Glasse, we need trouble you. The case has been very fully and ably argued, and I think we are entirely in possession of all the bearings of it. None of us have any doubt that the decision below, which was a decision of Sir G. J. Turner, when Vice-Chancellor, was perfectly correct. The equity which is sought is an equity in substance calling upon the court to aid the defective execution of a power against the parties who are entitled in default of that execution. Now, we need not say that that is a jurisdiction which the court does exercise in many cases which are well ascertained, and, amongst others, in favor of purchasers for value. There must, however, have been, in order to entitle the court to interfere, an execution, or an intended execution, though defective.

One question—which is a question of great nicety and importance—is, whether, if there has been no execution at all, other than that which is to be deduced from the conduct of the parties, a parol contract, evidenced, or at least supported, by subsequent acts, which, as against an owner in fee, would have entitled the court to interfere in favor of a purchaser, is such an execution as this court will aid against the remainder-men upon the application for the tenant for life. I do not think it necessary to give any distinct opinion upon that subject. Indeed, if it had been necessary to do so, I should have required further time to look into the authorities; but I must say, that, merely looking at them in a cursory way, according to my recollection, I think there is a great deal of force indeed in the doubt (to put it no stronger) expressed upon that subject by Sir William Grant, by Lord Redesdale, and subsequently by Lord Plunkett, in Ireland; because, when the principle upon which the court interferes in such cases is considered—namely, that it would be a fraud on the part of the person to insist upon the Statute of Frauds—I think it is extremely doubtful whether such a case is applicable to the doctrine of enforcing such a parol contract against remainder-men. However, I do not think, for the reasons I will now proceed to state, that it is necessary to decide that point.

The ground upon which I proceed here is, that there has been no contract proved, either written or parol. By contract, I mean no complete contract, the terms of which had ever been ascertained. No doubt it has been ascertained, that certain lands, which the company wanted for the purpose of their railway, and all of which they were entitled to take, would be wanted, and would be taken. All that remained, therefore, to be ascertained was that which alone had been left in doubt, namely, the sum of money to be paid for it. In order to ascertain that—I presume that the lands themselves were sufficiently ascertained—we have to refer back to the original agreement, which states that the company should within one month (that is,

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within a month after they first took possession) proceed, without any delay, to get the amount of compensation settled, either by arbitration or a jury, as Sir Charles Morgan shall choose. Now, Sir Charles Morgan never made his election either for one of those modes of proceeding or for the other, and therefore, it is quite clear that the only point remaining in doubt — namely, the amount of the purchase-money — never was ascertained by either of the modes which were pointed out. It has been suggested that that was immaterial; that the court may ascertain, or that some other step may be taken different from that which the parties stipulated as the mode of ascertaining, what the amount of the purchase-money should be. I confess that upon principle, as well as upon all the authorities, the court cannot, as it appears to me, take upon itself to do that. If there is an agreement that the price shall be that which is to be ascertained upon a fair valuation, then the court may interfere. All the authorities — the cases of *Milnes v. Grey*, 14 Ves. 400; *Blundell v. Brettargh*, 17 Ves. 232, and *Gourlay v. The Duke of Somerset*, 1 V. & B. 68 — enunciate the proposition in the strongest language, that where the parties have stipulated that the price shall be ascertained by arbitration — in *Blundell v. Brettargh*, it was by particular arbitrators; in *Milnes v. Grey*, it was not by a particular arbitrator, but by arbitration generally — if the arbitration does not proceed, and the price be so ascertained according to the mode in which the parties have stipulated, this court has no right to make a different contract than the parties have entered into, and ascertain the price for them in some different mode. That being so, it appears to me to put an end to this case; because the stipulation was, that the price (putting it in the most favorable way for the plaintiff) should be ascertained by arbitration. The arbitrator was never named in the life of one of the parties during whose joint lives the contract must have been completed; they never took any steps to ascertain that, without ascertaining which no contract could be made available. There is still some difficulty here, as I confess it strikes my mind; I do not know whether it strikes the other members of the court with equal force; but it strikes my mind as being extremely strong indeed, and it is this — the price was to be ascertained either by arbitration or by a jury, that is, by the lands clauses jury, which is the meaning of “or by a jury.” Unless it means that, what does it mean? It shall either be ascertained by contract, which, I think, means arbitration, the mode in which the parties stipulated, or it shall be ascertained by a proceeding *in invitum*. I do not mean that the parties may object to the jury; but the jury was the machinery which was in the hands and under the sole control of the defendants. They might insist upon having the price ascertained by a jury, quite independent of the contract on the part of Sir Charles Morgan and his son. Therefore the agreement comes only to this — “You shall have the land.” It was idle to say that; they were entitled to have the land; and in truth they only pointed out the land which they wished to have. “If you can settle the amount of that by contract, we will do so; or by an arrangement, we will do so; if not, you must proceed to take it in the mode in which

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the legislature has authorized you to take it, whether we consent or whether we do not consent."

Now, that being so, we are brought to a consideration which seems to me extremely important in this case. It is this—the purchasers here are not in the predicament which alone renders the interference of this court important in aid of the defective execution of a power. The court interferes because it is unjust on a purchaser not to give him the benefit of his contract; but here it is perfectly indifferent to the company who are the purchasers; whether the court interferes or not, they are certainly entitled to the land by one of the alternative modes fixed as the modes of ascertaining the value, though not entitled to insist on the other mode. What they say is this—"Having the right to take land, we mean to take it; if you choose to have the value ascertained by arbitration, it shall be done; if not, we shall proceed to a jury." That being so, it seems to me, that even if there had been much more, amounting to a contract, than I can discover upon the face of the evidence of what took place in writing, or the parol evidence, we should be going much further than any case has gone, if we were to say, that, under the circumstances of this case, the parties who had the power of defeating those in remainder shall be assisted in doing so, not for the benefit of the purchaser, but for the benefit of themselves, and in opposition to the interest of those whose rights the exercise of the power was to defeat. I am of opinion, therefore, that the decision of Sir G. J. Turner, L. J., (then Vice-Chancellor,) was perfectly correct, and this appeal, therefore, must be dismissed.

Knight Bruce, L. J. It is essential to the success of the plaintiff, upon this appeal, that a binding and enforceable contract,—a contract, at least, in equity binding, and in equity enforceable,—was made between himself and his deceased father on the one side, and the railway company on the other. Whether necessarily a written agreement, I decline saying; for the evidence is very far from satisfying me that there was any contract, except, indeed, a contract formed only by the Railway Acts—an exception which, substantially, for every present purpose, is no exception at all. As to a portion of the lands in question, neither was any price put, nor, according to my view of the evidence, was any mode of fixing it provided in any sense. And with regard to the expression, "arbitration or a jury," the present case falls far short of *Gregory v. Mighell*. Had the railway company filed a bill during the late Sir Charles Morgan's life, against him and the present plaintiff, for specific performance, and they had resisted the decree, and required the bill to be dismissed, could a decree have been made against them upon the footing of a contract, either written or in part performed? I am of opinion, certainly not; for as I view the matter, it is wholly uncertain what the words "arbitration or a jury" meant. If they are to be construed as explained by the Railway Acts, then it would be necessarily in the power, I suppose, of the railway company, in case of default on the vendors' part, to appoint an arbitrator for them. Did they intend this? I conceive not.

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What jury? How to be obtained, or chosen, or appointed? The words are, I repeat, to my mind inexplicable. I am sorry to say that I think the decree right — probably not alone — on the ground I have mentioned, though I consider that ground sufficient.

TURNER, L. J. I have already given my opinion upon this case, after having very carefully examined all the evidence in it; and it is not necessary for me to say more than that I entirely concur in the judgment which has been given.

Appeal dismissed.

SURCOME v. PINNIGER.¹

February 9, 1853.

Statute of Frauds — Parol Agreement — Marriage Consideration — Part Performance.

To a parol agreement by a father to convey property in consideration of the marriage then contemplated of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up by way of defence.

Such a contract would be decreed to be specifically performed.

THE question on this appeal related to the title to a sum of 269*l.* 3*s.* 11*d.*, which had been paid into court by the president and governors of King's College Hospital, as the purchase-money of certain leasehold premises in Carey street, purchased by them under the powers of an act of parliament enabling them in that behalf. The appeal was from an order made upon petition by Sir J. Stuart, V. C., for payment of the fund to Mr. George Charteris, the son-in-law of the intestate in the cause, whose title was contested by the appellant, Pinniger, the administrator of the intestate, under the following circumstances. It appeared that the premises in question were, by indenture, dated in July, 1842, demised to W. Aylwin, the intestate, for a term of twenty-one years, from the 25th March, 1839. In October, 1843, Charteris became acquainted with the daughter of Aylwin, to whom he made a proposal of marriage. This was made known to the intestate in December, 1843, who received Charteris as his intended son-in-law. At an interview between Aylwin and Charteris on the 2d January, 1844, the intestate, in the presence of a third person, informed Charteris that he held the leaseholds in Carey street, and that it was his intention to give them to him and his daughter on his marriage with her. The marriage was duly solemnized on the 12th March following, and shortly afterwards the intestate gave up possession of the leasehold in question to Charteris, and directed the tenants to pay him their future rents. He also, a few days afterwards, delivered to Charteris the documents relative to the premises.

¹ 17 Jur. 196; 22 Law J. Rep. (N. S.) Chanc. 419.

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Charteris and his wife then went to reside in a portion of the leaseholds in question, upon which he, in the intestate's lifetime, and with his knowledge, expended considerable sums in improvements. Charteris continued in the possession of the leaseholds in question, without disturbance, and received the rents paid in respect of the portion thereof unoccupied by himself, till the purchase for the hospital, which took place after the intestate's death. The petition of Charteris for the payment of the purchase money to himself was opposed by Pinniger, the administrator, who claimed it as belonging to the intestate's estate. It appeared also, from the affidavits, that the appellant, the administrator, was an attorney, a creditor of the intestate, and that he had persuaded Charteris not to administer to the intestate's estate.

Follett, Q. C., and *Kinglake*, in support of the appeal. The contract in this case, being by parol, and followed only by marriage, cannot be carried into effect under the Statute of Frauds, marriage being no part performance of the contract. If it could, there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding unless it be in writing; but if marriage be held part performance, every parol contract followed by marriage would be binding. *Dundas v. Dutens*, 1 Ves. jun. 196; 2 Cox, 235; *Lassence v. Tierney*, 1 Mac. & G. 551; 14 Jur. 182. The acts which followed the marriage—as the letting into possession, &c.—are not necessarily referable to the contract, and are not, for the purposes of specific performance, to be considered as a part performance of the contract. A mere deposit of deeds has been held not to be part performance. *Spurgeon v. Collier*, 1 Eden, 235.

W. M. James, for the plaintiffs.

J. Russell, Q. C., for the respondents, Charteris and wife, *contra*. There is here that, which, in the case of a contract to sell and convey for money, would be clearly part performance, namely, delivery of possession; and it has nowhere been decided, that in the case of an agreement to convey in consideration of marriage, delivery of possession is not a part performance of the agreement. The vendor, having once let the purchaser into possession, cannot plead the statute. In *Lassence v. Tierney* there was nothing but marriage following the agreement; but in *Hammersley v. Baron de Biel*, (12 Cl. & Fin. 45), where acts of part performance had been done by the husband, the case was taken out of the statute.

Follett, in reply.

KNIGHT BRUCE, L. J. This case, in point of fact, upon the evidence, stands substantially thus, as it seems to me:—Mr. Charteris, having proposed to marry the daughter of Mr. Aylwin, who was possessed of some leasehold property in Carey-street, Mr. Aylwin, in a conversation in the presence of a third person, expressed to Mr.

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Charteris his intention of giving to him and his wife the leasehold house, in the event of the marriage taking place. I consider that a promise to do so, and I consider that promise proved. The marriage took place, but, as no writing passed, it probably is true, that, if the case had rested there, the promise would have been ineffectual; and, however binding in point of morality and honor, would not have been binding in law. Some time after the marriage, however, the father-in-law gave up the property to the son-in-law, and it must, upon the evidence, be assumed that he gave up the property by reason and in performance of the verbal agreement before the marriage. The son-in-law takes and continues in possession of, and expends money upon, the property; is never disturbed, and is allowed to treat the property as his own. The father-in-law then dies, and the administrator of the father-in-law now says that all this is to go for nothing, and that the property still forms part of the father's estate. I am of opinion that he cannot be heard to say that. I am of opinion that this is a clear case of a parol agreement for valuable consideration in part performed. Therefore it is the settled law of this country, and has been so for a vast number of years, that against the agreement, under these circumstances, the Statute of Frauds cannot be set up as a defence. I am of opinion, for more than one reason, certainly for one very special one, that this petition ought not to have been presented, and that it should be dismissed, with costs.

TURNER, L. J. I was desirous of hearing this case fully argued, in order to hear what could be said upon the case of *Hammersley v. Baron de Biel*, as to whether it was affected by what was said by Lord Cottenham in *Lassence v. Tierney*. I think it clear that it is not affected, so far as regards its application to this case. What Lord Cottenham says in *Lassence v. Tierney* is, "There is nothing but a parol contract before marriage, and nothing but marriage following, which will not support the contract; and such a contract cannot be carried into effect under the Statute of Frauds." And he then goes on to say, "That is no new doctrine; it is what Lord Eldon lays down in *Dundas v. Dutens*, and has always been considered and recognized as law. In *Hammersley v. Baron de Biel*, I said that that case was distinguishable, because the husband, on his part, having consented before marriage, to do something, and having done it, there was part performance of the contract, the contract relating to property to which he was entitled." It is quite clear that does not affect *Hammersley v. Baron de Biel*, as applied to this case. In *Lassence v. Tierney* there was nothing but marriage following the agreement. But how does this case stand? Here there was a perfectly good parol agreement before the marriage. That was entered into for a full and valuable consideration. No doubt an agreement, in consideration of marrying the daughter of another, is made on a perfectly good consideration. This only difficulty exists — the Statute of Frauds opposes a difficulty in suing upon that agreement. It has been held in many cases, that if there be a written agreement after the marriage, in performance of the parol agreement made before the marriage, this takes it

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out of the statute; and it has been always held by this court, that delivery of possession is tantamount to a written agreement, and that part performance changes the rights and the position of the parties. No doubt there is in this case what Lord Cottenham went upon in *Hammersley v. Baron de Biel*. There was something following upon the agreement besides marriage. This doctrine is supported by *Taylor v. Beach*, 1 Ves. sen. 296, where Lord Hardwicke took the distinction between the case where marriage alone follows, and where other acts follow the parol agreement. It is quite clear this is an agreement which the court would have decreed to be specifically performed. I think, therefore, with my learned brother, that the petition should be dismissed with costs.

Knight Bruce, L. J. We do not intend that the costs of the administrator should be allowed out of the estate; we give the costs against him personally.

*Ex parte ECKERSLEY, and others, in re BYROM, and others, Bankrupts.*¹

February 14, 1853.

Bankruptcy — Payment of Laborers out of Bankrupt's Estate.

Drawers, employed in the excavation of mines, held not entitled, under the 169th section of the Bankrupt Law Consolidation Act, to payment of wages out of the estate of the bankrupt proprietors of the mines.

By the custom of mining districts in Lancashire, a collier or excavator, on being hired by the owners or manager of the mine, brings with him an assistant workman, called a drawer, with whom he divides, in proportions agreed upon between themselves, the gross earnings of the two, which are paid by the manager to the collier alone, but in proportion to the work done by the two. The drawer is always hired by the collier, but sometimes on the recommendation of the manager, and the collier keeps or dismisses him as he pleases, the manager, however, exercising a power to dismiss either the collier or the drawer for misconduct, and also a veto in case of improper dismissal of the drawer by the collier:—

Held, upon the bankruptcy of certain proprietors of mines in Lancashire, that the drawers of the mines were not laborers or workmen of the bankrupts entitled to payment of their wages in full, under the 169th section of the Bankrupt Consolidation Act, 1849.

THE bankrupts, previously to their bankruptcy, were lessees of coal mines in Lancashire; the petitioners were three workmen, who had been employed as drawers in working the mines, and to each of whom there was due at the time of the bankruptcy a small sum, not exceeding 40s., in respect of arrears of wages, for payment of which sums in full they had applied before the commissioner. The appli-

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cation was made under the 169th section of the Bankrupt Law Consolidation Act, 1849, which provides, that "when any bankrupt, at the filing of the petition of adjudication, shall be indebted to any laborer or workmen of such bankrupt in respect of the wages or labor of such laborer or workman, it shall be lawful for the court, on proof thereof, to order so much as shall be due, not exceeding 40s., to be paid such laborer or workman out of the estate of such bankrupt." The commissioner had refused the application, and this was a petition by way of appeal from that decision. It appeared that it was the custom amongst proprietors of mines in Lancashire to hire workmen, called colliers, to excavate the mines, and for each collier to bring with him an assistant, called a drawer, whose business is to convey the coal, when dug, in wagons, to the shaft of the mine. The drawer is never hired directly by the owners or the manager of the mine, but is always either brought by the collier on his being engaged to work in the mine, or taken by him on the recommendation of the manager. No payment is ever made to the drawer directly by the owners or manager of the mine, nor is the drawer's name entered in their books, but the gross earnings of the collier and his assistant (the drawer) are always paid by the owners or the manager of the mine, at the rate of so much per score baskets of coal raised, to the collier, by whom they are divided between himself and the drawer in proportions agreed upon between themselves, to which agreement neither the owners nor the managers are parties. Neither of these last ever interfere between the collier and the drawer as to their wages. The manager of the mine deposed that he considered both the collier and his drawer as his servants; that he had power to discharge either for improper conduct, but that in other cases it was usual for the collier either to keep or discharge his drawer at his option, taking care, however, always to have some one acting as drawer under him. In cases where the collier dismissed the drawer unjustly, the manager interposed his veto, and if the collier persisted, would dismiss the collier himself. The commissioner thought, that in this state of circumstances the drawer was the servant of the collier, and not that of the bankrupts, and that consequently there was no debt on which an action could be brought, or proof tendered, due from the bankrupts to the drawer. It appeared that there were seventy-six other drawers similarly circumstanced with the petitioners, and who were waiting the result of the appeal before advancing their claims before the commissioner.

Rogers appeared in support of the appeal.

J. V. Prior, contra.

KNIGHT BRUCE, L. J. It is difficult to avoid a feeling or wish to decide the case in the petitioners' favor, if it were possible to do so; but I have not been able to convince myself that the commissioner's decision is erroneous. I think there was not such a contract between the bankrupts and the drawers as, on the bankruptcy of the former,

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could bring the case of the latter within the meaning of the 169th section of the statute. The opinion of Sir J. Patteson, whom we have consulted on the legal question, and which, coming from such a man, is very weighty, is, that the drawers have no legal right of action against the bankrupts. My learned brother thinks with the commissioner, both as to the law and equity of the case; so that the decision of the commissioner would stand affirmed even if I were to dissent, which, I repeat, I do not.

TURNER, L. J. This case depends entirely upon the question whether the bankrupts were indebted to the petitioners, the drawers. I think they were not. The evidence before the commissioner, which is the only evidence before this court upon the appeal, shows that when the colliers were hired, they brought with them to their work their own drawers. The colliers, indeed, hired the drawers. In case of disapproval by the manager of the drawer hired by the collier, the collier took the drawer provided for or recommended to him by the owner or the manager. It appears, however, that the drawer, whether brought by the collier or provided by the manager, was paid by the collier out of his earnings, according to the terms of an agreement between themselves, in which the bankrupts or their manager took no part. It appears also, that if the manager withdrew the services of the drawer from the collier, the drawer was nevertheless paid what was due to him for wages by the collier, and that the collier had always full power to discharge the drawer, neither the bankrupts nor their manager interfering. Further, that if the collier discharged the drawer unjustly, the collier would be himself discharged, and that the collier and drawer were both liable to be discharged by the manager if they transgressed the rules prescribed as to the mode of working the mines, burning lamps, &c. I am satisfied, upon the circumstances, and particularly after the assistance of the able opinion which has been taken, that no action by the drawers would lie against the bankrupts, and that the bankrupts were not indebted to them. It has been argued, however, that the drawers have an equity to be paid out of the wages earned by the colliers. Assuming that to be so, still that will not alter or better the position of the drawers, nor enable them to stop the money belonging to the colliers in the hands of the bankrupts. It will create no debt from the bankrupts to the drawers.

Petition dismissed.

 Fitzwilliams v. Kelly.

FITZWILLIAMS v. KELLY.¹

December 6, 7, and 10, 1852.

Will — Construction — Administration of Assets — Costs.

A. B. was at the time of her decease possessed of a lease from charity trustees, for forty years, of certain lands held by them for lives, renewable when the *cestuis que vie* were reduced to five. A. B. had in her sublease covenanted to pay the fine on such renewal. By her will, after devising her freehold estates, she bequeathed "all her leaseholds at H. or elsewhere, and all her shares in the C. W. Company, and all her stocks, funds, and securities for money, and all other her personal estate and effects," to trustees, upon certain trusts as to each moiety thereof, being for her two nieces for life, with remainder to their children, with cross-remainders over in default of issue. The testatrix gave to her trustees special powers of leasing, cutting timber, &c. The testatrix died in September, 1826. In the month of July, 1825, the number of charity trustees had been reduced to five, and the fine therefore became payable; but, in consequence of disputes as to the amount, no trustees were admitted till 1835. In 1850, the number again became reduced to five:—

Held, first, that the fine which became payable in the testatrix's lifetime was payable out of her general personal estate in exoneration of the leaseholds.

Secondly, that the second fine, which accrued after the testatrix's decease, was not, as between the legatee of the leaseholds, and the general personal estate, payable out of the latter, but the legatee took the leaseholds *cum onere*.

The costs of the litigation respecting the amount of the fine, and of the second fine, so far as related to the present application, were directed to be paid out of the general personal estate.

THE special case stated that certain charity trustees, being in 1811 seised of certain renewable copyholds for lives in the manor of Hampstead, demised the same, by license of the lord, to Ann Buckner, for twenty-one years, from the 25th March, 1810, with a covenant for a further demise for nineteen years, in consideration of the rents and covenants, &c., therein reserved and contained, one of which covenants was a covenant by the said Ann Buckner, that she, and her executors, administrators, and assigns, should, during the said terms of twenty-one years and nineteen years, when and so often as the number of trustees was reduced to five, and new trustees should be appointed, pay all fines and fees to accrue on any and every admission of any such new trustee, the charity contributing 70*l.*, being one year's reserved rent, towards the payment of such fines and fees. On the 6th June, 1825, the number of the said charity trustees was reduced to five, three of whom died within the next eleven years, so that on the 13th July, 1836, there were only two trustees remaining. On that day, however, the number was made up to the full *quota* of fourteen, who were duly admitted to the premises. On the 18th September, 1826, subsequent to the period when the number of trustees had been reduced to five, but before any appointment of new trustees, Ann Buckner died, having, by her will, dated the 12th January, 1823, bequeathed the leasehold premises in question, together with other premises, to Sir Thomas Turton and Colonel Buckner, upon trust, as

¹ 17 Jur. 249.

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to one moiety thereof, to pay the rents, &c., to the testatrix's great-niece, Elizabeth Jenkin, (now the defendant, Elizabeth Kelly,) for her separate use, during her life, with remainder to her children, equally; and in default of children, to the testator's other great-niece, Anna Maria Jenkin, for her life; and after her decease, to her children in like manner: and as to the other moiety, upon the like trusts for the said Anna Maria Jenkin and her children in the first place, and in default of children, then upon the like trusts for Elizabeth Kelly and her children, with remainder over in case there should be no child either of Elizabeth Kelly or Anna Maria Jenkin, who should attain twenty-one, or marry. The defendant, Elizabeth Jenkin, afterwards married the defendant, Anthony P. Kelly, and of that marriage there were four children, and no more, three of whom had already attained twenty-one years of age; so that in effect the whole of these premises were limited as above to Mrs. Kelly for life, with remainder to her children equally. The defendants, Kelly and Fearon, were the present trustees of her will. The testatrix had appointed Sir Thomas Turton, Colonel Buckner, and Elizabeth Jenkin (now Elizabeth Kelly) her executors and executrix. All the testatrix's personal and testamentary expenses, and debts and liabilities, had been long since paid off, with the exception of the claim for fines and fees on the admission of the new trustees, as on the 13th July, 1836, amounting to 5,667*l.* 19*s.*, in respect of which the lord of the manor of Hampstead, Sir Thomas M. Wilson, had brought several actions for the fine at law, and at last succeeded in a verdict of 3,900*l.* fines and fees, and 150*l.* costs. Final judgment was entered up for this sum in 1839, the proceedings at law having been pending ever since 1827. See *Wilson v. Hoare*, 2 B. & Ad. 350; s. c. 10 Ad. & El. 236. In that year an information and bill was filed by the charity trustees, known as the suit of *The Attorney-General v. Wilson*, (not reported,) with the object, among other things, of obtaining an injunction against the lord's proceedings at law. An injunction was obtained to stay execution only, the proceedings at law being directed to be carried on. This suit, with divers supplemental suits and other offshoots, came on for hearing before Sir J. L. Knight Bruce, V. C., and afterwards, by way of appeal, before Lord Cottenham, C., who referred it to the Master (now Sir R. T. Kindersley, V. C.) to ascertain what, upon the footing of a decree of the 30th April, 1829, in the suit of *The Attorney-General v. Jones*, (not reported,) would have been a reasonable fine on the 6th June, 1825, (on which day the number of trustees became reduced to five,) for the admission of nine additional trustees. Divers proceedings were had in the Master's office on such reference, but no report was made, and at last terms were agreed to, subject to the approbation of the court. The causes being afterwards transferred to Vice-Chancellor Kindersley's court, an order was made on the petition of the defendants, Mr. and Mrs. Kelly, by which all proceedings were stayed in the said suits on the terms of payment by the defendants, Mr. and Mrs. Kelly, of 2,000*l.*, and interest at 4*l.* per cent. per annum thereon, from the judgment in 1839, to Sir Thomas M. Wilson, for fines due as in 1825, and 150*l.* costs, and a further sum

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of 2,000*l.* for fines on the admission of charity trustees in 1850, and all quit-rents in arrear to Lady-day, 1850, and steward's bills and costs of Sir Thomas M. Wilson, and certain other costs as between party and party. But the order was only to refer to past litigation, and was to be without prejudice to any new proceedings by any party; and the defendants, Mr. and Mrs. Kelly, were ordered to pay such several sums accordingly. The estate of the testatrix, Mrs. Buckner, had been generally dealt with according to her will, the income of the greater part having been paid to the defendant, Mrs. Kelly, and her sister, Anna Maria Jenkin, equally; but as to the Hampstead leaseholds, the trustees had accumulated out of the rents the sums of 6,538*l.* 18*s.* Consols and 2,044*l.* 13*s.* 5*d.* Reduced Bank Annuities. Sums amounting in the whole to 1,720*l.*, as the trustees' costs of litigation, &c., had been retained by the trustees out of the income. The term of twenty-one years, and extended term of nineteen years, in the Hampstead leaseholds, mentioned in the indenture of 1811, expired at Lady-day, 1850, in the lifetime of Mrs. Kelly and Anna Maria Jenkin. Anna Maria Jenkin died on 2d October, 1850, without ever having been married, and having appointed the plaintiffs, Fitzwilliams and Jackson, her executors, who duly proved her will on the 10th March last. It was admitted that there was sufficient money belonging to the estate of the said Ann Buckner, the testatrix, to pay all the sums mentioned in the said order, but whether Anna Maria Jenkin left personal estate sufficient to defray all her debts and liabilities depended upon the issue of the present case.

Rolt and Lewin, for the plaintiffs.

Pownall, for Mr. and Mrs. Kelly, did not take any part in the argument, as these defendants did not wish to argue against the interests of their children.

Bailey and Giffard, for the children entitled in remainder.

Rolt, in reply.

The following cases were cited in the argument: — *Hickling v. Boyer*, 3 Mac. & G. 635, 643; s. c. 9 Eng. Rep. 209; *Taylor v. Taylor*, 6 Sim. 246; *Sargent v. Roberts*, 12 Jur. 429; *Jones v. Jones*, 5 Hare, 461; s. c. 10 Jur. 516, 960; *Jacques v. Chambers*, 2 Coll. 435; 10 Jur. 151; commented on in *Blount v. Hopkins*, 7 Sim. 51; *Mills v. Mills*, Id. 501; stated to have been overruled; *Pickup v. Wharton*, 2 Cr. & M. 401; *Blann v. Bell*, 16 Jur. 1103, s. c. 13 Eng. Rep. 188; *Howe v. Lord Dartmouth*, 7 Ves. 147; *Pickering v. Pickering*, 2 Beav. 31; and 2 Jarm. Willa. 555.

December 10. TURNER, V. C., (after stating the case to the effect above appearing). All the questions mentioned in the special case reduced themselves ultimately to two, namely, first, how certain sums of money payable under covenants in the lease were to be borne as

between the general residue and the leasehold estate; and, secondly, how the costs were to be borne as between the same funds. It is to be observed in the outset that there is an express covenant by the lessee to pay the fines, as mentioned in the lease, when the trustees are reduced to five in number; and that it is admitted that the Chelsea Waterworks shares are in the nature of real estate. The number of trustees having become reduced to five in the lifetime of the testatrix, one fine became payable during her life. The first question is whether that covenant is or is not to be exclusively satisfied out of the leasehold estate. This was a debt contracted by the testatrix for the benefit of the leasehold estate, which the party taking that estate would have the benefit of. I am of opinion that the sum of 2,000*l.*, for the fines accruing due in 1825, is payable out of the general personal estate. It was a debt which became due in the lifetime of the testatrix, for which she might have been sued, and, if sued, might have been compelled to pay; and there is no warranty for the position that the devisee of the leasehold estates is to take them subject to liabilities which have already ripened into debts in the lifetime of the testatrix. The debt was due by her at the time of her decease; it might then have been paid by her representatives out of her general personal estate, and therefore it is now payable out of that estate.

There was a case (not cited in argument) of *Barry v. Harding*, 1 Jo. & Lat. 475, where the testator, on a purchase of lands which were at the time subject to a mortgage term, agreed with the mortgagor to pay the mortgage debt; and in consideration of this undertaking, and of a sum of money paid, and an annuity agreed to be paid, the mortgagor and mortgagee conveyed all their estate, &c., to the testator. Sir Edward Sugden held that the devisee of the lands was not entitled to have the mortgage debt (which was not paid off by the testator in his lifetime) satisfied out of the testator's general personal estate. [His Honor read part of the judgment of Sir Edward Sugden, at p. 490.] Now, this was rather a strong case, for there was actually a devise of the arrears of rents due by the under-tenants. The Lord Chancellor goes on to say, "I never before heard it contended that the devisee of a leasehold interest took the estate subject to all the arrears of head-rent which might be due in respect of it at the decease of the testator." That case, however, is distinguishable from the present case, so far as regards the 2,000*l.* The fine, therefore, is, at all events, not wholly thrown upon the leasehold estate; the devisee of that estate is not to take it *cum onere*; and the question is, whether that estate ought to bear its share of the burden — whether the fine, if not wholly to be paid out of the leasehold estate to which it relates, ought not to be charged on it *pro rata* with the general personal estate? The first consideration is, has the testatrix exonerated leasehold estates from payment of her debts, by throwing the debts on her general personal estate, not including leasehold? Cases were cited where, on an enumeration of items coupled with general personal estate, the particular items were held not to be included in the general personal estate. All these cases are to be referred to their particular circumstances. Thus one case was cited where the testa-

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tor gave "all my household goods and furniture, and all my general personal estate;" there household goods and furniture were held to be excluded from the general residuary estate.

Another case was cited where there was a gift of specific articles and of the general personal estate, and afterwards of the furniture: there the specific articles were held to be included in the general estate. Looking through this will carefully, not merely at the particular provisions, but so as to discover, if possible, the whole intention of the testatrix, I find enough to enable me to draw a distinction between the particular items and the general personal estate. The bequest of "all my leasehold estate," though not in terms specific, is yet specific enough to entitle the devisee to any leaseholds which she left. That she intended this bequest to be specific is rendered still more clear by the powers of leasing, &c., in her will, and the power of sale and cutting timber in the codicil. Therefore she appears to have intended a difference between the stocks, funds, and securities, and the rest of her estate, and to have considered these as a distinct portion of her estate. She intended these leaseholds and the Chelsea Waterworks shares to be enjoyed specifically; and although there is no specific bequest as to exoneration, still, as between the two devisees, this, the general personal estate, is to be the fund out of which her liabilities are to be discharged; and I think these liabilities are to be discharged out of that estate without including in it the leaseholds. This reasoning also determines the question as to the costs of the litigation about this fine, out of what estate they are to be borne.

Another and more difficult question is as to the second fine of 2,000*l.*, payable in consequence of the trustees having become a second time reduced to five in number, namely, only three days before the expiration of the lease, how this sum is to be borne as between the general personal estate and the devisee of the leaseholds. This fine is not on the same footing as the first, because it was not a debt due at the decease of the testatrix, but a mere liability entered into by her in respect of her leasehold property, to which neither she nor it might ever become actually amenable. Now, what is the nature of the liability into which she has thus entered? There is, as was admitted, a clause of reëntry in case she do not perform the covenants. This was what the testatrix had — an estate liable to be defeated on non-performance of the covenants. What she gave by her will was the same thing — an estate liable to be defeated. How can the devisee of an estate liable to be defeated have any right against the general estate of his devisor, to have that defeasible estate turned into an indefeasible one? or to be indemnified against the consequences of his own neglect in suffering it to be defeated? The payment of this fine is an element necessarily incident to the preservation of the lease; and the person taking the benefit of the lease must take its liabilities along with it, that is, subject to that power of the lessor to determine it on non-performance of the covenants. He cannot claim to be now put in any better position than he was in at the time of the decease of the testatrix. In *Blount v. Hopkins*, 7 Sim. 51, on a general be-

quest of personal estate, exonerated from payment of debts, which were charged on the real estates, the legatee of shares in the Birmingham Railway Company, which was of course personal estate, was held to be entitled to have future calls on the shares paid out of the real estates, future calls being considered debts of the testator. Now, the ground of exemption here is, that the testatrix has given certain personal estate, discharged from payment of debts; and therefore all I now have to consider is, whether this obligation is or is not a debt within the meaning of the testatrix. If I hold this not to be such a debt, *Blount v. Hipkins* does not seem to militate against the opinion which I have formed, that the leasehold estate carries its burden with it.

But there is another case, very near the present, which was not cited, and which has embarrassed me more than any other case—I allude to the case of *Marshall v. Holloway*, 5 Sim. 196. The marginal note is—“A, having a leasehold estate, on which he has covenanted to erect certain buildings within a specified time, bequeathed it, and also his general personal estate, subject, as to the latter, to the payment of his debts, to trustees, for B, for life, with several limitations over. A died before the time expired, and leaving the covenant unperformed:—Held, that his general personal estate was liable to make good the covenant.” The bequest there was of all messuages, lands, &c., and all other real and personal estate, upon trust to get in and convert into money, and to collect all debts due to the testator, and thereout to pay all his just debts, &c. The case seems at first sight an extremely strong case. If it had stood unaffected by the dicta in *Blount v. Hipkins*, and if the same circumstances had arisen, I should have felt myself bound by that case. But there is this distinction, that in that case there was an intention evinced in terms to discharge all debts out of the general personal estate, and in the present case there was no such intention manifested by the testatrix. She may say, “I intended this covenant to be discharged out of my general personal estate.” The question in each case for the court is, whether she has said so; and the same reasoning seems to have influenced the Vice-Chancellor in *Marshall v. Holloway*, for he says, (p. 203,) “It is idle to talk of persons beneficially interested in the residue, until it was ascertained whether there was any residue; and especially in this case, where the fund which was to be laid out upon the trusts of the will was the clear surplus moneys arising from the testator’s personal estate after payment of his debts.” That case, therefore, went on the particular provisions in that particular case, and not on any general rule of law. I observe, that in that case the Vice-Chancellor inquired as to the debts already paid out of the general personal estate. What was given to the legatee was the whole leasehold estate. The mortgage debt is not tacked to the estate. Even if he had described it as being subject to a mortgage, that would merely have been part of the description, and not as indicating an intention that the devisee should take on himself the payment of the testator’s debt.

The cases of *Jacques v. Chambers*, before Sir J. L. Knight Bruce,

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V. C., and *Barry v. Harding*, before Sir E. Sugden, would sufficiently have warranted the opinion to which I should have come, independently of authority, that this latter fine of 2,000*l.* is to be borne wholly by the leaseholds themselves, and not at all out of the general personal estate. The tenants for life will have to keep down the interest. The costs of the litigation respecting the first fine will follow the fine, and be paid out of the same fund, that is, out of the general personal estate; and the costs relating to the second fine, so far at least as the costs of this application, will also come out of the general personal estate, since it has been caused by a difficulty arising out of the will itself.

THORNHILL v. THORNHILL.¹

March 11, 1853.

Practice — Conveyancing Counsel.

Under the Masters in Chancery Abolition Act, the court cannot act on the opinion of the conveyancing counsel, in the case of an exchange.

This was a petition for the purpose of carrying into effect an exchange of lands under a private act of parliament, and it was proposed that a reference should be made to one of the conveyancing counsel to approve of the title of the lands to be taken in exchange. A question was, however, raised, whether the court had power to make such a reference under the 40th section of the 15 & 16 Vict. c. 80. The matter had been already in the Master's office.

J. Russell, and *Renshaw* appeared in support of the petition.

Hardy, for other parties.

KINDERSLEY, V. C. This seems to be a *casus omissus* from the act. It has been held that a power of sale will warrant an exchange; but here the words used are, "the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof." One thing is clear, that if a reference is made to a Master, the Master will be guided by the opinion of some counsel. It is true that the Master does not adopt the opinion of the counsel absolutely, nor should I; but, as the matter is now before the Master, I shall be justified, in order to avoid any difficulty, in sending it to the Master. If there were a general order of court including the case of an exchange, I should have no hesitation about it.

¹ 17 Jur. 252.

May v. Biggenden.

MAY v. BIGGENDEN.¹

January 11 and 12, 1853.

15 & 16 Vict. c. 86, s. 39 — *Vivâ voce Evidence of a Party at the Hearing.*

A subpoena *ad testificandum* issues *ex debito justitiæ* without the order of the court, and it is not necessary to obtain such an order beforehand, where there is a probability that the *vivâ voce* evidences of a party may be required at the hearing in the case, contemplated by the 39th section.

Semble, that if the court wishes to have the *vivâ voce* evidence of a party under that section, the course would be, if he were not present, to adjourn the hearing.

THIS was a motion by the plaintiff that he might be at liberty to issue a subpoena *ad testificandum*, directed to the defendant, John Biggenden, directing him to attend at the hearing of this cause. There was evidence, by affidavit, showing that it was of great importance to the plaintiff's case, and to the discovery of the truth of the matters in the pleadings mentioned, that Biggenden should be examined *vivâ voce* at the hearing.

W. D. Lewis, for the motion, referred to the 39th section of the statute 15 & 16 Vict. c. 86, and the case of *Smith v. The Swansea Dock Company*, 9 Hare, App. 20; s. c. ante, p. 55, note, which made it requisite, in cases where a necessity for the *vivâ voce* examination of a party at the hearing was probable, to apply previously for leave to serve the party to be examined with a subpoena. Such an application did not determine whether he was to be examined or not; it was merely a precaution to insure his attendance in case he should be wanted, and to prevent the inconvenience of delay at the hearing, or a possible failure of justice for want of proper evidence.

Bazalgette, for the defendant, Biggenden, opposed the motion, as unsupported by any authority. He referred to *Smith v. The Swansea Dock Company*, 16 Jur. 1130; s. c. ante, p. 55. It was a mere motion, not the hearing of the cause; and under the 40th section of the act, the examination *vivâ voce* for the purpose of a motion must be, not in court, but before the examiner.

[Bacon, Q. C., *amicus curiæ*, said that he was counsel in the case cited, and that, being forbidden to use an affidavit which had been filed too late, he offered to examine the deponent, who was a party, *vivâ voce*; but that Sir R. T. Kindersley, V. C., said no; he ought to have been examined by subpoena before the examiner.]

He pointed out the great inconvenience that would ensue from the practice sought to be introduced by this motion. It would be necessary to make similar motions in almost every cause, against some or

¹ 17 Jur. 252; 22 Law J. Rep. (N. S.) Chanc. 429.

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all the parties, lest their evidence *vivâ voce* should be required. The more obvious and convenient course would be, in the few cases where such evidence was thought by the judge to be desirable, to adjourn the cause in order to obtain it. The 39th section gave this discretion to the judge to use, instead of directing an issue at law. The plaintiff was seeking, by this application, to introduce supplemental evidence, which he had had full opportunity of obtaining in the ordinary way.

[STUART, V. C. What is asked is simply leave to serve a subpoena; that does not determine whether the party is to be examined or not.]

J. H. Palmer, for another defendant, resisted the motion, because the evidence proposed to be introduced would be against all the defendants.

W. D. Lewis, in reply, said that the record and writ clerks had refused to issue a subpoena in this case without the order of the court.

STUART, V. C. A subpoena issues *ex debito justitiæ*; no one ever heard of an order being necessary for that purpose.

One of the record and writ clerks having been summoned, his Honor, having conferred with him, said that it appeared that the application for the subpoena had been made with reference to this 39th section, and for the purpose of compelling the defendant to appear at the hearing of the cause, and had, therefore, been refused.

W. D. Lewis argued further, that the motion would not be common, because the court would require some *prima facie* case to be made that the *vivâ voce* evidence would be wanted at the hearing.

STUART, V. C., said that this application was stated to be necessary, in consequence of the recent changes in the practice of the court directed by the legislature, and also, as to other matters not now in question, by the General Orders of the court. It was said to be rendered necessary by special circumstances in the cause: first, because according to the course of the court, the proper officer would not issue a subpoena, to answer the purpose for which it was required in the present instance, without the order of the court; and in the next place, because, on the facts stated in the affidavit in support, which were very peculiar, the court was pressed with the consideration that the circumstances of the case were such as that, under the discretion given to the court by the 39th section of stat. 15 & 16 Vict. c. 86, it would require a *vivâ voce* examination of this defendant at the hearing of the cause. The question then was, whether, for the purposes of justice, under the authority of this act of parliament, the court would be authorized to make the order asked for. If the order was asked under the 39th section, his Honor thought that the provisions of that section pointed to nothing in the nature of a subpoena, but empowered the court, at the hearing of the cause, upon the hearing,

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if it should see necessary, to order any parties to be examined *vivâ voce*; and therefore, if the order to issue a subpoena were a novel and unprecedented matter in the practice of the court, his Honor had no authority under the 39th section to make an order directing the clerk of records and writs to issue a subpoena of this kind. Then it was argued, that at the hearing of the cause, if, under the discretionary power conferred upon it by the 39th section, the court should consider that it was necessary to have an examination of this defendant *vivâ voce*, it would be a very inconvenient course to have the hearing interrupted to order the attendance of the party whose examination might be necessary, and it would be just that the party whose examination was necessary should have notice beforehand that his examination would be required, and that could be done by serving him with the writ of subpoena that he might attend. On the other hand, it was said that the course under the 39th section, according to the true construction of that section, was, that the court at the hearing, and upon the hearing of the cause, was, if it should seem necessary, to have recourse to the provisions of that section, and could only do so by ordering, upon the hearing, the defendants to appear and be examined. His Honor said that he thought the latter was the more just construction of that section.

Upon the question of convenience, there could be no doubt that the purposes of justice and of all parties would be better served by an authoritative notice before it appeared necessary, in order that the defendant might be ready to attend. According to the old practice of the court, it was the legitimate mode of proceeding, for the plaintiff to have recourse to the evidence of a defendant as a witness in the cause; and it was a motion of course for the plaintiff to obtain an order to examine the defendant before the examiner. There no inconvenience was occasioned by that course, and the evidence of the defendant was obtained in a regular and proper mode. His Honor thought that there would be great convenience in making an order of the same kind, either by issuing a subpoena, or in some other way, to enable him to know and to assure the plaintiff that there would be no delay at the hearing, owing to the absence of the party sought to be examined. But the construction of the statute must not be unduly extended beyond what was expressed. His Honor thought that if the plaintiff were to give notice to the defendant, in a great degree the whole purpose and convenience to be answered by a special order would be obtained. The present application was novel, and, in his Honor's opinion, not authorized by the true construction of the 39th section. It was said that Sir R. T. Kindersley, V. C., in *Smith v. The Swansea Dock Company*, 16 Jur. 1123; s. c. *ante*, p. 55, had expressed an opinion which countenanced this motion. The reports of the case, however, with which his Honor had been furnished, differed; and his Honor had been assured by the counsel in the cause, that it was not to be inferred from what passed, that Sir R. T. Kindersley, V. C., thought it the proper course, to move for leave to issue a subpoena in such a case as the present. Under the 40th section it was clear that a subpoena must issue in the case for which it provi-

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ded; and if Sir R. T. Kindersley, V. C., had said that a subpoena ought to issue on an application to be made for that purpose, and by that application was to be understood a motion, that would be a novel practice, not authorized by the course of the court. But, in fact, it was not the view taken by Sir R. T. Kindersley, V. C., that a motion was to be made for leave that a subpoena should issue; and his Honor could see nothing in what passed before Sir R. T. Kindersley, V. C., to make it appear that Sir R. T. Kindersley, V. C., would differ from the opinion which his Honor entertained adverse to the present motion. The motion must, therefore, be refused; and, as it seemed to his Honor to ask what was palpably unauthorized, it must be refused with costs.

LEWIS V. DAVIES.¹

January 20, 1853.

Production of Documents — Title Deeds — Privilege.

In a suit for redemption, by a mortgagor, against the transferee of the mortgage only, the plaintiff confessing the defendant's title, but stating that he was unable to discover, and seeking discovery, by what means the defendant made it out:—

Held, that the defendant was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, and to be relevant to the matters in question, on the ground that it was privileged as the defendant's title deed.

THIS was a motion, on the part of a mortgagor in a suit for redemption against the transferee of the mortgage, who was the sole defendant, to compel him to produce the deed of transfer. The bill stated the original mortgage for a term of years, and that the defendant claimed to be, and, so far as the plaintiff could at present discover, was, by assignment or other rightful devolution of title, lawfully and rightfully possessed of and entitled to, and had then vested in him, the thereinbefore-stated mortgage debt, and the hereditaments and premises mortgaged, but that the plaintiff was unable to discover by what means and title, and by what deed or deeds, the defendant became so entitled, and that the defendant ought to make discovery of these matters. It was further stated, that the defendant had entered into possession of the premises in 1844. The bill contained the usual charge and interrogatory concerning documents. The answer admitted the substance of the above-mentioned allegations, and stated that the defendant was the transferee of the mortgage, and set out the date and material contents of the deed of transfer. The answer also admitted the possession of the deed of transfer and its relevancy, but denied that it would tend to prove the truth of the matters in question, except as admitted in the answer. The answer stated fur-

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ther, that the deed constituted evidence of the defendant's title as transferee of the mortgage, and submitted that it was a privileged document.

Rogers, for the motion.

[STUART, V. C., asked if there was any authority for the proposition, that this was not the defendant's title deed, or that the plaintiff had a right to see it?]

No; but the defendant is in possession of my property, and I have a clear right to know by what title he is in possession.

[STUART, V. C. Why have you not made the original mortgagee a defendant, and sought the discovery from him? You do not state any title adverse to this defendant,¹ or suggest that other persons have any title to the mortgage. If you do not deny the defendant's title, this deed is evidence of his title, and not of your title at all.]

But I do not know, unless I have this discovery, to whom I must pay the mortgage-money, or who should reconvey.

[STUART, V. C. The defendant must procure all proper parties to join in the reconveyance.]

Yes; but I have a right to know who are the proper parties. At present I have a stranger in possession of my land; he says that he is the transferee of my mortgage. If so, he is the only proper party to my bill to redeem. I have a right to know how that is proved.

Bevir, contra. The plaintiff in his bill states, that the defendant is the transferee of the mortgage, and the defendant by his answer confirms that, and sets out the material parts of the deed of transfer. No case is made for seeing this, which is the defendant's title deed. [He cited *Gill v. Eytton*, 7 Beav. 155.]

Rogers, in reply. If this defendant be the *bona fide* transferee of the mortgage, the original mortgagee is not a proper party to this suit. If the transferee does not claim by a valid transfer, I cannot get back the estate from him. It is part of my case that there is a valid transfer; therefore the deed is as much my title deed as the defendant's. Sir G. J. Turner, L. J., has said, in effect, that if it is necessary for the plaintiff to prove at the hearing a deed in the defendant's possession, in order to obtain relief, he has a right to see it. Here it is necessary for me to prove at the hearing that the defendant is transferee of the mortgage.

STUART, V. C., said that he thought it was a reasonably clear case. The mortgagor, claiming to redeem, had brought one defendant before the court, who admitted his right to redeem; that defendant was in possession of the estate by a title derived from the original mortgage. His Honor said that he was asked to make an order to compel the defendant to produce his title deed, but he thought that it would be violating the rule of privilege to make such an order.

¹ See *The Attorney-General v. Thompson*, 8 Hare, 106.

Whalley v. Whalley.

WHALLEY v. WHALLEY.¹

January 31, 1853.

Change of Solicitor.

Upon the decease of the solicitor employed by a party to a suit, proceedings taken by a new solicitor employed by him are regular, although the change of solicitor is not authorized by any special order of the court.

HUMPHRY moved to dismiss the bill against Edward and Ann Whalley, two defendants, for want of prosecution. The answers had been in long beyond the stipulated time, and the plaintiff had taken no step.

Lewin, for the plaintiff, contended that he was justified in treating these answers as non-existent, since they were put in by another solicitor than he who had first appeared for these defendants, and there had been no order obtained to authorize any change of solicitor.

Humphry. We have employed another solicitor because the first is dead. No order is necessary in such a case. The record and writ clerk has received and filed the answers, so that they are regular, till you get them taken off the file.

Lewin, in reply.

WOOD, V. C. No order is necessary in such a case. The 18th General Order of October, 1842, was intended to prevent parties being harassed by several solicitors. The first solicitor employed is dead; he can never molest you any more. The order does not apply to a dead man. The plaintiff has received notice of the change of solicitor, and of the filing of the answer, and he comes here to-day in accordance with notice given you by this very solicitor, whose name has been entered by the record and writs clerk, and I am now informed that the plaintiff has actually bespoken a copy of this very answer, whose existence he would ignore. Take to the second seal, to get in the answers of the other defendants who have not yet answered, and to file a replication.

 Thornton v. Court.

THORNTON v. COURT.¹

January 13 and 19, 1853.]

Breach of Covenant for quiet Enjoyment — Compensation in Equity.

A, in 1842, conveyed land to B, and entered into a covenant for quiet enjoyment, but not into any covenants for title. B mortgaged to C in the same year. In 1846, an ejectment was brought, which B defended, but was evicted. B then sued A at law, for damages upon the covenant, who pleaded that at the time of eviction the legal estate was in C, the mortgagee. B submitted to the plea, and afterwards A, the original vendor, paid off the mortgage, and obtained possession of the mortgage deed, whereupon was an acknowledgment of the receipt of the mortgage money, and that the same was in full discharge of the same, and interest, and all right of action or demand of C, the mortgagee, against A in respect of the covenants in the conveyance to B. B filed a bill against A, praying that B might be declared entitled to the benefit of the covenant, and that a reference might be sent to the Master to assess the damages sustained by him by reason of the breach of it. The court below dismissed the bill: but, on appeal:—

Held, that the plaintiff was entitled to have the damages assessed, and gave him leave to bring an action upon the covenant, and restrained A the defendant, the original vendor, from setting up the mortgage deed or indorsement by way of defence.

In April, 1842, the defendant executed a conveyance to the plaintiff of some land at Whitegate, in the county of Chester. The purchase-money was 180*l*. The deed contained no covenants for title, but a covenant for quiet enjoyment in the following terms:—"And the said William Court doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree that he, the said Ralph Thornton, his heirs and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said hereditaments and premises mentioned to be hereby granted and released, and receive and take the rents, issues, and profits thereof to and for his and their own use and benefit, without the let, suit, hindrance, interruption, or denial of the said W. Court, his heirs or assigns, or of any person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise, by the said W. Court and his heirs well and sufficiently saved harmless and kept indemnified of, from and against all and all manner of former and other gifts, grants, bargains, leases, mortgages, surrenders, forfeitures, rents, arrears of rent, dower, statutes, judgments, executions, extents, titles, charges, and incumbrances whatsoever made, done, committed, or executed by the said W. Court, or any other person or persons whomsoever."

In the same month of April, 1842, the plaintiff mortgaged this property to Samuel Bolshaw for 200*l*., and afterwards sold part of it for 70*l*.

In July, 1846, an action of ejectment was brought against the plaintiff by a party, who claimed under a title paramount to that of the defendant. The plaintiff defended the action, which was tried, in April, 1847, at the Cheshire Spring Assizes, and a verdict was deli-

vered for the claimants, with costs. The defendant did nothing to authorize the defence of that action.

In 1848, the defendant paid to Bolshaw 220*l.* in satisfaction of his mortgage debt and interest, and took from him the following memorandum:—“Memorandum that I have this day received from W. Court, of The Manor near Middlewich, in the county of Chester, Esq., the sum of 220*l.*, being in full satisfaction and discharge of all principal money and interest secured by the within deed, and also in full satisfaction and discharge of all rights of action which I might or could have against the said W. Court, by virtue of or under the covenants of the said W. Court, contained in a certain indenture, bearing date the 9th day of April, 1842, and made between the said W. Court, of the one part, and R. Thornton, of the other part; and I undertake that I, my heirs, executors, and administrators, shall, on the demand and at the expense of the said W. Court, his heirs, executors, or administrators, execute such release, transfer, or other assurance, as the counsel of the said W. Court, his heirs, executors, or administrators, shall advise and require. Witness my hand, the 14th day of October, 1847. SAMUEL BOLSHAW.”

In June, 1847, the plaintiff commenced an action against the defendant to recover damages for the breach of covenant for quiet enjoyment, to which the defendant pleaded that the claimant in the action of ejectment had not a good title; and that action was abandoned.

In October, 1845, the plaintiff and Bolshaw conveyed a part of the hereditaments for 70*l.*, to a son of the plaintiff, who immediately afterwards mortgaged it to Baker for 140*l.*, and the defendant had since paid to Baker 101*l.* 12*s.*, in satisfaction of his claim under that mortgage.

In March, 1851, the plaintiff filed this bill against the defendant, alleging all these transactions, and stating that he had improved the property, and had expended in such improvements a sum of 150*l.* He insisted that he was entitled to recover from the defendant the following sums: 180*l.* the purchase-money, 9*l.* the costs of the conveyance, 8*l.* the costs of the mortgage, 150*l.* the amount of improvements, 100*l.* the costs of defending the action, and 143*l.* the costs of the plaintiff in the action, part of which were still unsatisfied. And he submitted to allow the defendant the following sums: 220*l.* paid to Bolshaw, and 70*l.* received by the plaintiff for part of the land sold by him previously to the action.

The bill prayed that it might be referred to the Master to assess the amount of loss and damage sustained by the plaintiff, and to which he was still liable in consequence of the breach of covenant, and to take an account of the money paid to Bolshaw in satisfaction of the mortgage debt and interest; and that all necessary directions might be given for enabling the Master to make such assessment and take such account, the plaintiff submitting to allow the defendant such sums as should appear to have been paid by him, and 70*l.*, the purchase-money, for the part sold.

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The cause came on to be heard, before the Master of the Rolls, in May, 1852, when his Honor dismissed the bill, without costs, and from that decision the plaintiff appealed.

R. Pulmer and J. Nicholson, for the plaintiff, in support of the appeal. The object of the bill is to recover compensation by way of damages for the breach of a covenant for quiet enjoyment, there being no remedy, or, if any, only an inadequate remedy at law. *Ranelagh v. Hayes*, 1 Vern. 189. The plaintiff, previously to the eviction, had mortgaged the land in fee. At the time of the eviction the mortgage was subsisting, and the legal estate was, of course, vested in the mortgagee. The plaintiff, however, after eviction, brought an action at law on the covenant in his own name against the defendant. To this action the defendant pleaded, (amongst other things,) that at the time of the eviction the plaintiff had no estate or interest in the land. This plea was an answer to the action. Soon afterwards the defendant paid off the mortgage, and took a receipt in full of all demands in respect of the covenant, together with an undertaking to release the covenant. By this act of the defendant and the mortgagee, the plaintiff's remedy at law was practically taken away. The defendant obtained that which is as available at law as a release, namely, accord and satisfaction. But the defendant cannot in this court claim the benefit of a wrongful act to which he was a party. Moreover, in an action at law in the name of the mortgagee, the remedy would be inadequate, for in such action the mortgagee (the nominal plaintiff) could not allege in his declaration, and therefore could not prove, that he had sustained any costs in defending the action of ejectment to which he was no party, but the plaintiff in this suit is entitled to such costs, and would have recovered them at law if he could have sued in his own name. *Smith v. Compton*, 3 B. & Ad. 407. The plaintiff is also entitled to recover for agricultural improvements. *Lewis v. Campbell*, 3 Moore, 35; s. c. 8 Taunt. 715; affirmed in error, 3 B. & Ald. 392; *Edwards v. M'Leay*, 2 Swanst. 287. The plaintiff is entitled to read the indorsement on the mortgage deed which is admitted in the answer as evidence of the allegation in the bill that the mortgagee had released the defendant from the covenant.

Lloyd and Twells, for the defendant. The bill seeks a remedy in this court for the breach of a covenant for which there is a remedy at law. Such a bill is not maintainable. *Todd v. Gee*, 17 Ves. 273, and *Sainsbury v. Jones*, 2 Beav. 462; s. c. 5 Myl. & Cr. 1. It was once supposed that such a bill could be sustained on the authority of *Denton v. Stewart*, 17 Ves. 276, n.; but *Denton v. Stewart*, though followed in *Greenaway v. Adams*, 12 Ves. 295, was disapproved of by Lord Eldon, and overruled by *Todd v. Gee*. The plaintiff having defended the action of ejectment without consulting the defendant, Court, cannot, at all events, be allowed to recover, as against the defendant, the costs of his unsuccessful defence. *Dryden v. Frost*, 3 Myl. & Cr. 670; *Lord Portarlington v. Graham*, 5 Sim. 416; *Wil-*
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iams v. Burrell, 1 Com. B. Rep. 402; *Gillett v. Rippon*, Moo. & M. 406.

KNIGHT BRUCE, L. J. The defendant in this case entered into a covenant for the peaceable enjoyment by the plaintiff of an estate which he sold to him. The plaintiff having paid his money for the purchase and entered into possession, mortgaged once or twice as he was entitled to do. He thus parted with his legal estate and his legal powers, and with his right to bring an action for damages; but he became entitled to redeem the property and reinstate himself in the fullness of his original right. In this state of things, an adverse claim or title paramount to his is asserted, and the plaintiff being in possession defends himself at law unsuccessfully. The paramount claim, which was adverse to all the plaintiff's rights, succeeded, and the plaintiff was evicted. No man can doubt in that state of things his right to recover some damages — some substantial damages, from the covenantor whose covenant has thus been broken. The defendant, the covenantor, being aware of this, applied to the mortgagee in whom the legal estate was, (a legal estate carrying with it of course the whole right at law to sue on the covenant,) and paid him off, acquiring thereby the rights that the mortgagee had. He took at the same time an acknowledgment from the mortgagee, that the payment was in full of all demands upon the covenant, thereby creating, according to my present opinion, — though it is not very material whether it did or did not, — a case of accord and satisfaction, rendering it impossible for him ever to be sued on this covenant. The plaintiff, therefore, is left entirely without remedy in a court of law by the act of the defendant, and he now comes to this court asking, whether in a perfect form or not, is a matter unimportant, for an opportunity of assessing the damages, either here or in a court of law, which he would plainly have had a right to assess in a court of law, except for the right acquired by the defendant. If that is the true view of it, as I believe it is, it is plain what course is to be taken in this state of things. There is a right in the mortgagee, or in the person to whom the mortgage has been transferred, to every shilling of his advance, with interest, and there must also be assured to the plaintiff a right to take an account in order to ascertain the amount of damages to which he is entitled at law, for having lost this estate. The amount of damages cannot be ascertained, as I think, and my learned brother seems of the same opinion, by us, here, without the consent of both parties to the litigation; and, perhaps, even with the consent of both parties, we might not improperly decline to assume such a jurisdiction; but I am rather disposed to think that upon the request of both parties, we might take upon ourselves the burden of so doing. Unless they do so, there must be an action to ascertain the true amount of damages, and I suppose that the mode of enabling that to be done will be to allow the plaintiff within a limited time to bring such action as he may be advised against the defendant, and to restrain the defendant from setting up the deed of mortgage executed by the plaintiff; the matter to be brought on again in this court when

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judgment shall have been obtained, and execution not to issue without leave of this court.

TURNER, L. J., after stating the earlier transactions, said,— In October, 1847, the defendant, Court, paid Bolshaw the amount due on his mortgage, and took an acknowledgment in full of all damages under the covenant. In the first place, the observation, or rather question, arises, had Bolshaw a right as between himself and the plaintiff so to deal with the rights of the plaintiff under the covenant? I am of opinion that he had not. Bolshaw, as mortgagee, was charged with this duty; on payment of the mortgage-money he was bound to re-convey to the plaintiff, and give him the benefit of the covenant. It was a breach of the duty which Bolshaw owed to the plaintiff, and, in fact, amounted to a sale by Bolshaw to Court of the benefit of the covenant, which he had no authority to make, and not being authorized to make it, it was not binding on the plaintiff. But then it was said that to support a case of fraud, it was necessary in this case that fraud, as between Bolshaw and Court, should be alleged and proved; but, in truth, it is apparent that Bolshaw has exceeded his authority in transferring the mortgage to Court, and I think it is quite a sufficient thing to be made out that he acted in excess of his authority, to be equal to a distinct allegation of fraud. Again, it is said, that the plaintiff should have applied to Bolshaw for authority to defend the action; but he had put himself in a position in which he could not grant such an application if made. It is thirdly said, that the defendant might have given notice to the plaintiff that he intended to deal with Bolshaw, so as to affect Bolshaw's right; and, therefore, that he cannot set up the release of the covenant. It is also said that no damage has been sustained, and that no damages can be recovered; but it is impossible not to see that damage has been sustained in respect of the covenant; and the question here is, whether the plaintiff is or is not entitled to bring an action at law, and to whatever is necessary to secure a trial of the question of damages,— and I concur with my learned brother in thinking that he is. With that view, the order will be — “ Retain the bill for twelve months, with liberty for the plaintiff to bring such action against the defendant on the covenant as he may be advised; and if the action shall be brought within the limited time, the defendant is to be restrained from pleading or giving in evidence the mortgage executed by the plaintiff or the memorandum indorsed on the deed of 1847.”

Ex parte Wood; In re The Vale of Neath and South Wales Brewery Joint-Stock Co.

*Ex parte WOOD; in re THE VALE OF NEATH AND SOUTH WALES
BREWERY JOINT-STOCK COMPANY.*¹

January 12, 1853.

*Company — Winding-up Acts — Contributory — Legatee of Shares —
Executor of Proprietor.*

A proprietor of shares bequeathed them to an unmarried lady, who subsequently married. Neither on the death of the testatrix, nor on the marriage of the legatee, were the regulations of the deed of settlement complied with. The court was of opinion that there was no sufficient evidence of the assent of the executor of the testatrix to the legacy, or that the directors of the company had approved of the legatee and her husband or all of them, as proprietors or proprietor of the shares; and, therefore:—

Held, overruling an order of one of the Vice-Chancellors, (by which he had reversed a decision of the Master,) that the legatee and her husband were not liable as contributories, and that the liability of the executor not having ceased, his name was properly placed on the list of contributories, without qualification.

AN appeal was presented in this matter by the official manager, from an order made on the 25th of November, 1852, reversing a decision of Master Brougham, dated the 13th of July, 1852, by which he had included the name of Mr. Samuel Thomas Wood on the list of contributories of the company in respect of five shares, without qualification, and by which order his Honor had directed Mr. Wood's name to remain on the list, in respect of such shares, as liable only up to the death of Miss Lydia Keene, he being the surviving executor of her will.

The facts of the case were, that Miss Lydia Keene, in December, 1841, bought of Joseph Rusher five shares in the company; and by indenture, dated the 14th of that month, made between Mr. Rusher of the first part, Miss Keene of the second part, and _____, one of the trustees of the company, of the third part, the shares were assigned; and the deed contained the following covenant:—“And the said Lydia Keene doth hereby, for herself, her heirs, executors, and administrators, covenant, promise, and agree to and with the said Joseph Rusher, and also separately with the said _____, that she, the said Lydia Keene, her executors, administrators, and assigns, shall and will in all respects, whilst she shall continue a holder of any shares of the said company, well and truly observe, perform, and fulfil and keep all the covenants, articles, stipulations, and agreements which are or ought to be observed, performed, fulfilled, and kept by her, her executors, and administrators respectively, in respect thereof, or in relation to such shares for the time being, remaining in her name in the books of the said company, according to the true intent and meaning of the same covenants, articles, stipulations, and agreements respectively.” Miss Lydia Keene did not execute the company's

¹ 22 Law J. Rep. (N. S.) Chanc. 365.

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deed of settlement. By her will, dated the 6th of July, 1842, she specifically bequeathed these shares to her sister, Miss Mary Cadby Keene, and appointed William Keene and Samuel Thomas Wood executors. Miss Lydia Keene died on the 8th of July, 1842, and shortly afterwards a dividend on the shares was declared, in respect of profits up to the midsummer of that year, and was to be payable in September. Mr. W. Keene, who had shares of his own, and who had acted as Miss M. C. Keene's agent with reference to other shares she held in the brewery, in August, 1842, wrote to the secretary of the company the following letter:—

“Trowbridge, August 13, 1842.

“Dear Sir,—I duly received the notice from the directors respecting the dividend to be paid on the 1st of September, and beg to inform you that my sister, Miss M. C. Keene, is and will be at my house, so that she will thank you to forward her dividend here. I have also to request that you will send the amount due to Miss L. Keene, deceased, to me, as the executor under her will, to which I have just administered. Her shares will have shortly to be transferred to my sister, M. C. Keene.”

In November, 1842, Miss M. C. Keene was married to the Rev. Mr. Kluht, and in January, 1843, Mr. Keene wrote to the secretary thus:—

“Trowbridge, January 27, 1843.

“Dear Sir,—I beg to inform you that my sister (in your books Miss Mary Cadby Keene,) is now Mrs. Kluht; her address is, however, the same as before, Wall Cottage, Twickenham, near Hounslow, Middlesex. Her shares, as well as those of my deceased sister, Lydia, will be transferred, I believe, when the legacy duty is paid, to Mrs. Kluht's husband, the Rev. H. B. Kluht, of which I will forward positive instructions as soon as I have paid the duty at Somerset House.

“I am, dear sir, yours very truly,
“MR. W. LOWTHER.

W. KEENE.”

Upon receiving this last letter, the secretary wrote against the shares in the share ledger of the company the name “Kluht,” and subsequent circulars respecting the shares were sent to Mr. Kluht. Mr. Keene acting on his own account, and also acting as agent for Mr. Kluht, afterwards accepted a bill drawn on behalf of the company for a sum of money, being the amount of calls due from Mr. Keene on shares of which he was beneficial owner, and of calls due on these five shares. Mrs. Kluht died in March, 1845. An order was made for winding up the affairs of the company, and the name of Mr. Kluht was sought to be placed on the list of contributories. See *Ex parte Kluht*, 19 Law J. Rep. (N. S.) Chanc. 385; s. c. 3 De Gex & Sm. 210. Mr. Keene died, and the name of Mr. Wood, the surviving executor of the will of Miss Lydia Keene, was placed on the list, no claim having been made against her estate since her death,

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until January, 1849, and on appeal, as before mentioned, the Vice-Chancellor Stuart differed from the Master.¹

Russell and Terrell now appeared for the official manager, in support of his appeal from the order of the Vice-Chancellor, relying on the fact that there had been no acceptance of the shares by Mrs. Kluht before her marriage, nor by her or her husband after their marriage, so as to render them or either of them liable. Neither had they or either of them complied with the requisitions of the deed of settlement of the company, so as to entitle them to be considered as shareholders or members, whether by her being a legatee of shares, or by her husband being the husband of a female shareholder. The 38th, 41st, and 44th clauses² were in all respects conclusive on these

¹ The judgment of His Honor was as follows:—"In this state of things the Master has placed on the list of contributories in respect of these shares, not Mr. Kluht's name, but that of Mr. Wood, the surviving executor of Lydia Keene, and without limiting his liability. In support of this it was alleged, that there was no assent on the part of the executors to the legacy to the sister of the testatrix, or of the shares having been accepted by Mr. Kluht or his wife. I, however, consider that there is sufficient evidence of such assent and acceptance. It was then contended, that the approbation of the directors of the company was necessary under the 38th and 44th clauses of the deed of settlement. On referring to the 41st clause it will be found that 'in all cases of husbands, executors, administrators, or legatees, applying to become proprietors of shares belonging to or claimed by them in those characters, and being approved of by the directors, such alterations shall be made in the share register book,' &c. Now, in the present case, all the circulars have been sent to Mr. Kluht, the name has been entered in the share register book, and by an arrangement with Mr. Kluht a bill of exchange was drawn by the company upon Mr. Keene for a sum which included the sum due from Mr. Kluht to the company in respect of a call upon the shares in question; and I cannot hold that the transfer of the shares has been made without the approbation of the directors. I shall, therefore, direct that the name of Mr. Wood shall remain on the list, but liable only up to the death of Lydia Keene."

² Clause 38. "Husbands of female proprietors, executors, administrators, or legatees, may, with the approbation of the directors, to be manifested as hereinafter mentioned, but not otherwise, be admitted and become proprietors of the company in respect of the shares which belonged to or were claimed by them as such; but husbands, executors, administrators, or legatees who do not apply to or obtain the approbation of the directors to be admitted proprietors, and also all guardians, &c., shall, within six calendar months after being entitled to the shares belonging to or claimed by them respectively in such characters, sell and dispose of the same, and on refusal or neglect so to do shall forfeit the said shares for the benefit of the other proprietors of the company; every purchaser or transferee of a share or shares, and every husband, administrator, and legatee who shall have obtained the approbation of the directors to be admitted a proprietor of the company in respect of the share or shares belonging to or claimed by him or her as such, shall, unless already a proprietor in respect of some other share or shares, execute this indenture or some deed of accession thereto, binding himself or herself to conform to, observe, and abide by all stipulations, regulations, and provisions for the time being affecting or intended to affect the proprietors of shares in the capital and property of the company; and no purchaser, transferee, husband, executor, administrator, or legatee, unless already a proprietor, shall, before being approved of by the directors as fit to become a proprietor, or before executing this indenture, or some deed of accession thereto, be entitled in any manner or respect whatever to any of the rights, privileges, or benefits of a proprietor of the company, save and except to a proportionate part of the income or proceeds of the capital and property of the said company, upon the next yearly or other divisions thereof."

Clause 41, "Upon all transfers of shares to purchasers and others approved of by

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points. With regard to the liability of Mr. Kluht, that had been decided in the negative, *Ex parte Kluht*¹; and then the only question was, as the directors of the company had not, nor had the company, according to the terms of the deed of settlement, approved of either Mrs. Kluht before her marriage, or of her or her husband after the marriage, as owner or owners of the shares, upon whom the responsibility rested? Neither the husband nor the wife ever having been responsible, the surviving executor of the will of the last proprietor, Miss Lydia Keene, was the party liable; and Mr. Wood filling that character, the Master was right in placing his name upon the list of contributories without qualification; and, therefore, the order of the Vice-Chancellor overruling that decision ought to be reversed.

The following cases were cited:—*Ex parte Gouthwaite*, 3 Mac. & G. 187; s. c. 2 Eng. Rep. 57; *Ex parte Straffon's Executors*, 1 De Gex, Mac. & G. 577; s. c. 10 Eng. Rep. 275; *Ex parte Crossfield*, 2 De Gex, Mac. & G. 128; s. c. 13 Eng. Rep. 284.

Bacon and Roxburgh, for the respondent.

Russell, in reply.

the directors, and in all cases of husbands, executors, administrators, or legatees applying to become proprietors of shares belonging to or claimed by them in those characters, and being approved of by the directors, such alterations shall be made in the Share Register Book, and also in the copies by way of certificate of former entries therein respecting the same shares, as the circumstances may require. And the approbation of the directors in all the above cases (to be valid) shall be manifested by entries or memorandums to that effect in the Share Register Book, under the signature of two of the directors for the time being, and by like memorandums so signed, added to, or indorsed upon the copies or certificates of the former entries respecting the shares in question in the Share Register Book; or, instead of such last mentioned memorandums, by such copies or certificates being delivered to the parties entitled thereto of the new or altered entries respecting the same shares in the Share Register Book."

Clause 44. "Whenever any share or shares in the capital of the company shall become forfeited, or shall be duly and effectually vested in any new proprietor, and such entry or alteration in regard to such share or shares shall have been made in the Share Register Book as hereinbefore required, then, and not before, the responsibility of the previous owner as a proprietor in the company, with respect to the same share or shares, shall, from and after the completion of such entry and certificate granted as aforesaid, and the payment of all instalments on such shares previously called for, cease and determine as to the same share or shares; and such previous owner shall thenceforth be exonerated and released from all subsequent claims, demands, and obligations in regard to the same share or shares, and from all future observance and performance of the covenants, conditions, and stipulations contained in or referred to by this indenture, or in or by any deed or deeds relating thereto: and the certificate to be given by the directors as hereinbefore required of such entry, erasure, or alteration, shall at all times be evidence of such acquittance and discharge as aforesaid in respect of such share or shares. And the person in whom any share or shares shall or may become vested, and whose name shall be entered as the approved proprietor thereof in the Share Register Book as hereinbefore mentioned, shall immediately thereupon, but not before, have and be subject to all the same privileges, advantages, and future liabilities, in respect of such share or shares, as the person originally owning such share or shares."

¹ *Ubi supra*.

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KNIGHT BRUCE, L. J. *Prima facie* the estate of Miss Lydia Keene, who was proprietor of five shares in this company at the time of her death, would continue liable in respect of those five shares; it is upon those who assert that such liability has ceased, to prove it. It is said that the liability has ceased under the 38th and 44th sections or clauses of the deed, inasmuch as Miss Lydia Keene made a will, by which, either as part of her residue or specifically, she bequeathed the shares in question to her sister, who, after the testatrix's death, married a gentleman of the name of Kluht. It is said that the executor assented to the bequest, whether it was specific or residuary; and that the legatee, or husband, was approved of by the directors in a binding manner as a proprietor, or that they were both approved of as proprietors in respect of these shares, as from the death of the testatrix; in which case it is assumed that the liability of the executor ceased. It is denied, on the part of the official manager, that there was any assent to the bequest. It is denied, also, on his part, that Mr. and Mrs. Kluht were approved of as proprietors of these shares as successors to the testatrix, and consequently that a discharge of the estate has not arisen. [His lordship read the three clauses and proceeded.] Now it is plain and undisputed, that the things required by the deed of settlement to be done were not done; and, therefore, if the letter of the deed is to be followed, the responsibility has not ceased, and the Master's conclusion was correct. But it is said that, although every thing provided by the deed was not done, something that is equivalent has been done; inasmuch as the usual manner of proceeding by the company was so loose, and departed from the language of the deed so much, that the course of proceeding taken ought to be considered as the course of proceeding adopted by the company, and substituted for what ought to have been done. In ordinary partnerships, any clause of a deed may be departed from or waived, where two or three or four partners alone are interested; and thus it often happens that on winding up such concerns, a different course is pursued from that pointed out by the deed. The same course, attended with the same results, is not absolutely impossible in cases of large companies, called joint-stock companies, in which, as it is impossible for every proprietor to interfere directly in the management of the business, it is often delegated to a chosen body as directors. But there is a difference in acting in such a case, because agents (as the directors are) must carry their instructions exactly into effect, and cannot depart from their deed. Now, in the present case, it appears to me, from the best attention I have been able to give to the case, it fails on two grounds. In the first place, how is it shown that the body at large did assent to a departure by the directors from those provisions in the deed, as to the manner of exhibiting the assent of the directors to the introduction of a new partner? The evidence does not authorize this conclusion. If the body at large had been shown to make the directors their agents to give consent, they must have been bound by it. But the observation, that the directors themselves have concurred in the approval of the husband and wife, or both, in respect of the shares, does not appear, from the evidence, to

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be proved. The concurrence of the directors with the acts of the secretary does not appear to be proved, even if it were of any importance. The proprietors at large have a right to say, not only in form but in substance, that those acts were not done by which the responsibility of the estate of the testatrix could be made to cease. It illustrates the case to observe that no man living can tell what manner of proprietorship was accepted in lieu of that of the testatrix; it nowhere appears. But it is most essential to show which of these things was intended to be done, and was done. For these reasons, my impression is, that the Master was correct.

TURNER, L. J. I concur in this opinion. The deed of settlement provides for the shares of legatees becoming vested in them with certain qualifications and stipulations. Though there may be conduct on the part of the directors which may dispense with the stipulations of the deed, showing that all the proprietors have concurred, that has not been shown. Now the argument at present is, that there has been approbation on the part of the directors to the vesting of the shares in the legatee of her husband. There are two grounds insisted on. First, it is said, a letter was written to the secretary, in which the executor expressed himself to the effect that the dividends must be paid to the legatee; and another, in which he said that the shares must be transferred to her husband, Mr. Kluht; and the secretary, in consequence of this last letter, wrote in pencil against the shares, in the share ledger, the name "Kluht." Whatever weight must be attributed to that, it is shown that, at a subsequent period, the dividends were paid to Keene, the executor. Subsequently, in the years 1843 and 1844, a transaction of this kind took place:—it became necessary for shareholders to advance 5*l.* per share, and Mr. Keene gave his acceptance for 400*l.*, being 330*l.* on account of his own shares, and 70*l.* on account of the shares left to Mrs. Kluht. This was renewed by another bill, and the bill was returned on Mr. Keene paying the 330*l.*, but the 70*l.* was not paid. Now it has been held in *Kluht's case*, that the circumstances which took place did not make him liable as to shares in his wife's right. I do not see how it makes him liable as legatee, or his wife either; and if it did not render either of them liable, there was no shareholder liable except the executor of the testatrix. The Vice-Chancellor's judgment, therefore, must be reversed. This is not a case of specific bequest; but, assuming it to be so, it makes no difference, for it is not only necessary that there should be assent, but approval on the part of the directors. The costs of the official manager are to come out of the estate, and we dismiss the petition with costs as against the others.

The Attorney-General v. The Corporation of Exeter.

THE ATTORNEY-GENERAL v. THE CORPORATION OF EXETER; *Ex parte*
THE GOVERNORS OF THE HOSPITAL OF ST. JOHN, IN THE CITY OF
EXETER.¹

June 12, 1852.

Municipal Corporation Act — Charities — Charter.

The Hospital of St. John, in the city of Exeter, was incorporated by letters-patent of King Charles I., and the mayor, recorder, aldermen, and common council of the said city, for the time being, were thereby appointed to be governors of the said hospital, and of the lands, revenues, and goods thereof, and they were to have a common seal. The recorder was not, prior to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, a member of the corporation, but he was an officer elected by the corporation: —

Held, that the circumstance of the recorder being a member of the corporation of St. John, but not of the municipal corporation, did not prevent this case from falling within the 71st section of the Municipal Corporation Act.

THE Hospital of St. John, in the city of Exeter, was founded by letters-patent of King Charles I. dated the 2d June, 1637, and by them there was granted to the mayor, bailiffs, and commonalty of the city of Exeter, power, licence, and authority to erect, found, and establish, in the house called St. John's Hospital, and other the premises adjoining, an hospital, house, or place of abiding, for the sustentation, relief, and education of poor children, &c., and such other members and officers of the said hospital as to the governors thereof and their successors, or the greater part of them, should seem meet; and that the said governors should have power from time to time to place therein such master or head of the said hospital, and number of poor people and children, and such other members and officers, as to them should seem convenient, &c.; and the said governors and their successors were thereby also authorized to erect and establish therein a free grammar-school and a free English school, and from time to time to appoint head masters, &c.; and it was thereby declared "that the said hospital should be incorporated, and called the Hospital of St. John, within the city of Exeter, founded by Hugh Crossing, Esq., and others; and his Majesty thereby erected, established, and confirmed the same to have continuance for ever, and appointed and ordained that the mayor, recorder, aldermen, and common council of the said city for the time being should be governors of the said hospital, and of the lands, revenues, and goods thereof, and be incorporated by the name of the governors of the hospital aforesaid, with power to purchase and take land, to sue and be sued by their said name, and to have a common seal." Shortly after the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, an order was made, upon several petitions in this matter, referring it to the Master to appoint proper persons to be trustees of and for the charity estates and property

¹ 17 Jur. 265.

then lately vested in or under the administration of the corporation of Exeter, or any of the members thereof in that character, which were affected by the 71st section of the said act, 5 & 6 Will. 4, c. 76. The Master made his report, dated the 31st January, 1837, which was afterwards confirmed, approving of certain persons to be such trustees; and amongst the charities so specified, the Master included St. John's Hospital. The corporation of Exeter, which before the passing of the act consisted of the mayor, aldermen, and burgesses, and did not include the recorder, took no part in any of the proceedings subsequently to the said order of reference, and the trustees so approved of as above stated took upon them the management of the said hospital, and of the estates and revenues thereof, and have ever since continued in such management. As the office of head master of the grammar-school was about to become vacant, a petition was now presented in the name of the old governing body of St. John's Hospital, stating the above facts, and submitting that the said hospital and its estates did not come within the meaning of, and were not affected by, the 71st section of the said act of parliament, inasmuch as the body corporate of the city of Exeter, or any one or more of the members thereof, did not, at the time of the passing of the said act, stand solely, or together, with any person or persons elected solely by such body corporate, or solely by any particular member, class, or description of members of such body corporate, seised or possessed for any estate or interest whatsoever, of any hereditaments, or any sums of money, chattels, securities, or any other personal estate, in whole or in part, in trust or for the benefit of any charitable uses or trusts to be executed for the benefit of the said hospital, or otherwise connected therewith; but the said property and revenues of the said charity, and the control, management, disposition, and disposal of the property, revenues, and affairs thereof, and of the hospital, were entirely and altogether vested in the petitioners as a distinct and independent corporate body, by virtue of the aforesaid letters-patent; that they have always been ready and willing to perform their duties as governors of the said hospital; and they submitted that the right to appoint the head master of the said grammar-school was vested in them. The petition prayed that the order confirming the Master's report of the 31st January, 1837, might be discharged, so far as the same effected the estates, property, or revenues of or belonging to the said hospital; and that, if necessary, it might be declared that the petitioners' powers as governors of the said hospital are not affected by the 71st section of the said stat. 5 & 6 Will. 4, c. 76, &c.

Fooks (*Rolt* was with him) in support of the petition. I submit, that there being a separate corporation of the governors of St. John's Hospital, though consisting of the municipal corporation and the recorder, that separate corporation was not within either the letter, the spirit, or the mischief that was intended to be remedied by the Municipal Corporation Act. The 71st section does not apply to a case, unless where the municipal body corporate, as a body corporate named in either Schedule (A.) or (B.), (interpretation clause, sect.

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142,) stood solely, or together with any person or persons elected solely by such body corporate, &c., seised of the property — that is, it applies to those cases where the estate and the powers of such body corporate were, by the act, to cease and determine on the 1st August, 1836, but it does not apply to a case where there is a body corporate distinct from the body corporate mentioned in Schedule (A.) or (B.); and in this case the letters-patent created a distinct corporation of St. John's Hospital.

[LORD-CHANCELLOR. If you show me that there were two corporations of the mayor, bailiffs, and commonalty, I will grant your argument. The grant is, that the mayor, bailiffs, commonalty, and recorder shall be trustees, and the grant does not afterwards allude to the recorder, no more than it does to the aldermen.]

I should feel that difficulty if the recorder had been a member of the corporation; but I submit, that his not being a member of the municipal corporation, and being a member of St. John's Hospital corporation, clearly proves that the two corporations were not identical, but were distinct, and had, and still have, a separate existence. Distinct accounts also were kept of the estates of the hospital, and the government of it was distinct.

Follett, for the trustees appointed under the reference. The argument of the other side is more one of words than of substance. The charter provided no means of succession for the subincorporation, except by the continuing of the municipal corporation. It is clear, therefore, that if there is any substantial body presenting this petition, it is the municipal corporation; and if it be, it is not identical with the old corporation, for now the recorder is a member of the corporation. The other side say that this case is not within the act, because the recorder is a member of the subincorporation. I submit that this is the very case that was contemplated by the 71st section. The recorder is either a member of the corporate body, or he is elected by the corporate body; so that then, if we get rid of the new name of "St. John's Hospital," we have disposed of the whole of the argument. But there is nothing in the statute which excludes the case of a subincorporation from the operation of the act. The 72nd and 73d sections confirm this view of the case; and if the other side succeeded in their argument, the municipal corporation would be the very persons to manage this property. The 92nd section shows that no money of any kind is to be received by this body but what is to form part of the "borough fund;" which proves that the act had considered, that by the previous sections it had taken out of the corporations every property other than municipal property. I submit, therefore, that this case is within the letter of the act of parliament; but if there be any doubt of that, it is clearly within the meaning to be collected from the context and from the spirit of the act. But, lastly, I submit that it might be a very great doubt whether such a corporation as the present could form the subincorporation of the Hospital of St. John, for the recorder is now appointed by the crown, and the whole nature of the municipal body is altered.

Rolt, in reply. This case is clearly not within the words of the 71st section; and the only question is, whether it is within the mischief.

[LORD CHANCELLOR. Had this subincorporation a distinct seal?]

Yes; and I submit, that even if the recorder had been omitted, there would have been two distinct corporations. But looking at the case as it really existed, it is clear that the municipal corporation was not seised of this property on the 1st August, 1836, within the meaning of the act, for the recorder was jointly seised with them. Then is this case within the spirit of the act? It is not correct to say that this statute was passed to correct abuses in charities generally; it was only intended to correct abuses in the administration of estates vested in municipal corporations. The corporation of the Hospital of St. John, was not a municipal corporation. In the case of *Doe v. Norton*, 11 M. & W. 913, the corporations were identical; and Parke, B., said, p. 927, "It has occurred to us as a matter of considerable doubt, whether this section, section 71, applies to the present case, because the municipal body corporate of Bristol did not stand seised of any land. It was a separate corporation, with a distinct name of incorporation and a distinct corporate seal, that was seised of the land in question, though the natural members of the body corporate were the same as those who constituted the municipal corporation." But here the corporations are not identical. The other side say that it is doubtful whether the subincorporation exists; and this depends upon two other doubts—whether the old corporation exists, and whether the recorder exists. The first fallacy is, that the present corporation is a new corporation. It has been decided over and over again that a breach of trust in the old corporation could be fixed upon the new; and Lord Langdale would not listen to my argument for the corporation of Leicester, in a case of breach of trust, that they were a new corporation, and therefore not liable. But further: I submit, that even if the corporation of Exeter was annulled, still, if a body called "the mayor, aldermen, and common council" continued, the corporation of St. John's would still exist. Next, as to the recorder, nothing depended upon the mode of appointment of the recorder. It was only necessary that he should be the recorder of Exeter to entitle him to be a member of the corporation of St. John's.

LORD CHANCELLOR, (Lord St. Leonards.) The corporation of Exeter existed under the title of "the mayor, bailiffs, and commonalty," and under that title it is dealt with by the Municipal Corporation Act; and in the second part of schedule (A.) it is styled "the mayor, bailiffs, and commonalty of the city of Exeter." Certain estates having been dedicated to charitable purposes, a charter was granted, declaring that the governors of the Hospital of St. John should be "the mayor, recorder, aldermen, and common council of the said city for the time being," and they were incorporated by that style. Now, they were incorporated expressly, by the first part of the charter, (the license,) by the style of "the mayor, bailiffs, and commonalty." Now, I take it that that might be considered either as a

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separate corporation, or as consisting of the same members. I believe the city of London to be a corporation, not only as the city of London, but also as trustees for charities. There are many such cases. Bristol is one, where the same component parts were considered to form a new corporation for other purposes, having a distinct seal or name for these purposes; yet the court has treated them as existing corporations. The question is, whether they were, as such, affected by this act of parliament.

The cases which have been referred to do not touch this question, for there were not only demises by the old and new corporations, but this further fact, that the court was only dealing with the legal estate, and they were of opinion that it was not divested; but I observe, that not one of the judges at all dissented from the doctrine that the trust or equitable interest might be dealt with under the act. First, it may be a considerable question whether this corporation of St. John's exists at all. No doubt there is a corporation of Exeter — no doubt there are aldermen, and in a sense common councilmen, and a recorder; but though they exist, they do so in a very different quality; they have the same name, but are different persons. The crown now names the recorder; the whole body are differently elected; they are, therefore, a distinct body; and whether the former corporation can be considered as existing after their constitution has been so changed by parliament, I do not take upon myself to decide; but the question is, whether they fall within the act of parliament. I understand the argument in favor of the old corporation of St. John's Hospital to be, that the act of parliament does not pretend to deal with trusts generally; that though abuses may exist, yet, unless the case comes within the Municipal Corporation Act, I cannot deal with it.

Now, the act of parliament is singularly framed. By sect. 1, I observe that it repeals so much of all law statutes and usages, and so much of all royal and other charters, grants, and letters-patent, as are inconsistent with or contrary to the provisions of this act. So that, in point of fact, if I find any part of the charter inconsistent with the act, it is repealed. It was foreseen that many of these corporations held estates in trust for charities, and that there had been great abuses in the management of them, and it was thought proper not to suffer them longer to continue trustees. The object of the legislature was to prevent the same body who had the control of the municipal fund from managing the charity trusts. It has been argued, that unless I can find the legal estate in the municipal corporation, I cannot deal with it. Now, I do not apprehend it to be necessary to show that the legal estate would pass out of the municipal corporation. But the clause upon which the whole depends is sect. 71. That section recites — "Whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate in trust, in whole or in part, for certain charitable trusts, and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund." It was supposed, therefore, that estates vested in bodies corporate, which they held, in whole or in part, for charitable purposes, would, unless otherwise provided for, be drawn into the public fund of the corporate body.

The act assumes that such charitable funds would have become mixed with the "borough fund," unless a provision was made for its going in a contrary channel; and that provision is — "that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate, or solely by any particular number, class, or description of members of such body corporate, seised or possessed, for any estate or interest whatsoever, of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of this act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which, before the passing of this act, they were such trustees, until the 1st August, 1836, or until parliament shall otherwise order, and shall immediately thereupon utterly cease and determine." Now, it would be admitted that if, instead of creating a new corporation, the charter of the crown had gone to authorize the municipal corporation to manage this trust property, then this case would have been within this act of parliament, for they would be standing solely seised or possessed of this property, in trust, or for the benefit of those charities of St. John's Hospital; and the same body would also have had other corporate property, which would form the "borough fund." I apprehend, that, under those circumstances, it would be perfectly clear that this act would apply.

Now, what is the distinction between that case and the present? Why, only this — that here the charter constitutes the corporation by the same name, but with the introduction of a new party — the recorder. Now, whether the recorder be or be not considered a part of the municipal corporation, it comes very much to the same thing; he is an officer of the corporation, if he be not a member of it; but now he is a member of the corporation, and the question is, does the act hit that case? Are the mayor, bailiffs, and commonalty of the city of Exeter, with the addition of the recorder, gone as a corporation for charitable purposes? What are the words? [His lordship again read the 71st section, and proceeded:] Therefore the intention was, not only that the act should apply where the corporate body stood seised for charitable purposes, but also where any particular member of that body in his corporate capacity stood solely so seised. Perhaps, in strictness, this would not hit the present case; for neither the body corporate nor any member of that body stood solely seised of this charity property. But then the act goes on, "or together with any person or persons elected solely by such corporate body," &c. They were not solely seised, therefore, as a general corporate body, but they were a body consisting of the same individuals, with the addition of the recorder. Then they are a body corporate, together

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with a person, namely, the recorder, who is elected by that body corporate; and I am of opinion that it is a case directly within the act of parliament.

What is there in the act of parliament to exclude this case from it? That it was intended to provide for this case is perfectly clear; for the undoubted intention was, that if a municipal corporation was found to be trustees, as a corporate body, of property for charitable purposes, these charitable purposes were no longer to be intrusted to them. Here it is said that the corporate body, and the body forming the charity trustees, were not the same body. The only difference between them is, "the recorder," and he was a person elected by the municipal corporation. It appears to me, therefore, that according to the provisions of this act of parliament, coupled with the interpretation clause as to "trustees," the present case is clearly within the meaning of the act, although the argument on the other side was very ingenious; and I am confirmed in my construction of it by the 72d and 73d sections.

Petition dismissed, without costs.

BALDWIN v. ROGERS.¹

March 7, 1853.

Will— Gift to Cousins — Period for ascertaining Class.

A testator gave property, after the failure of prior limitations, "unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns forever, as tenants in common:"—

Held, that the words "and the issue," &c., did not make the class ascertainable *in futuro*, but that the first cousins *ex parte maternâ*, living at the testator's death, took vested interests, liable to be divested *pro tanto*, so as to let in all other first cousins born before the period of distribution.

ROBERT HENSHAW made his will, dated the 17th May, 1779, and thereby devised and bequeathed his real and personal estate to trustees, upon trust for his wife, Mary Henshaw, for her life, subject to certain trusts for raising portions for his children, and then proceeded as follows:—"And from and after the death of my said wife, I give, devise, and bequeathe all and singular the said messuages, lands, tenements, hereditaments, and premises, real and personal estate, whatsoever and wheresoever, and every part thereof, unto such of my children as shall be then living, and the issue of such of them as may happen to be dead, in such parts, shares, and proportions as my said wife, if living, shall, by any deed, &c., give, limit, direct, or appoint the same; and, for want of such deed, will, or appointment, then in trust for my said children, equally to be divided between them, share

¹ 17 Jur. 267.

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and share alike, as tenants in common, and not as joint-tenants, and *per stirpes*, and not *per capita*. But in case I shall have no child or children living at the time of my decease, or in case they shall all die before attaining their respective ages of twenty-one years, then I give unto my said wife, Mary Henshaw, the sum of 2,000*l.* absolutely to her own use; and I also give, devise, and bequeathe the same messuages, lands, tenements, hereditaments, and premises, real and personal, and every part thereof, to my said wife, Mary Henshaw, and her assigns, for and during the term of her natural life; and from and after her death, I give, devise, and bequeathe the same, and every part thereof, unto and to the use of my sister, Elizabeth Henshaw, and to such of the issue of her body lawfully to be begotten as she shall by deed or will give the same unto; and in default of such appointment, then share and share alike, *per stirpes*, and not *per capita*, and to their issue; and in default of such issue as aforesaid of myself and my said sister, or upon their total extinction under twenty-one years old, I give, devise, and bequeathe the same, and every part thereof, unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns for ever, as tenants in common, and not as joint tenants, subject to and chargeable with the several legacies and sums of money hereinafter given." The testator then gave legacies to his wife's two brothers and three sisters, (who with the testator's wife, were all first cousins of the testator by his mother's side,) and declared that the legacies were given "upon condition only that I and my said sister, Elizabeth Henshaw, shall both die without issue; for in case I or my said sister shall leave any issue behind me or her at the time of our respective deaths, or in *ventre sa mere*, who shall live to attain the age of twenty-one years, then I revoke and make void all and every the said last mentioned legacies and sums of money." The testator died in 1781, leaving no issue. His sister, Elizabeth Henshaw, died in 1800, unmarried. The testator's widow died in 1834. The testator had at his death fourteen first cousins on his mother's side, of whom his wife was one. Three of them died without issue in the lifetime of his sister; seven more died without issue in the lifetime of the widow; another died in the widow's lifetime, leaving issue; and the other two survived the widow. The plaintiffs had become entitled to the interests of the two cousins who survived the widow, and of the issue of the cousin who died leaving issue in the widow's lifetime; and they claimed the whole residuary estate. The Attorney-General was made a party, because the heir at law could not be found. The cause was transferred from the paper of Sir R. T. Kindersley, V. C., to that of the lords justices.

Rolt, Q. C., and *Sidney Smith*, for the plaintiffs. The question is, whether the class is to be ascertained at the death of the testator, or of his sister, or of his widow. We say at the death of the widow. The rule as to a gift to children applies only to cases where the testator has in contemplation to give to the children of some particular person — where he has in view the parental relation. It would be very

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inconvenient to apply the rules governing a gift to children to such a numerous and remote class as cousins. The rule, that a gift to next of kin after a life-estate applies to those who are such at the testator's death, depends upon the expression "next of kin," being a technical expression, which, like "heirs of the body," needs a very strong context to control it. Here there is nothing to control the natural meaning of the words, which point to a distribution among a class to be ascertained upon the failure of the prior limitations. *Miller v. Eaton*, Coop. 272; *Butler v. Bushnell*, 3 My. & K. 232. Even if the gift had ended with "my first cousins on my mother's side," the whole scope of the will would show that the class was to be ascertained at the widow's death; but the subsequent words referring to the contingency of cousins dying in the widow's lifetime, leave no doubt upon it.

Malins, Q. C., for the real and personal representatives of the several cousins who died without issue in the widow's lifetime. When there is a gift to one for life, then to a class, *prima facie* all persons who are members of that class at the testator's death, take vested interests. The fact, that the gift to the class is contingent on an event which may not happen, does not alter the rule. *Bird v. Luckie*, 8 Hare, 301; 14 Jur. 1015; *Steri v. Patel*, 5 Bing. N. C. 434; *Gundry v. Pinniger*, 1 De G., M., & G. 502; s. c. 11 Eng. Rep. 63. The construction contended for by the plaintiffs is inconvenient, as it would make the property inalienable during the widow's life. There are no words in the gift pointing to ascertaining the class at a future period. The limitation to the issue is introduced to prevent lapse; it is a mere substitution of issue for their parents.

Baggallay, (with *Malins*.) When the testator meant a class to be ascertained at the widow's death, he said so. He in terms gives the property to such of his own children as should be living at her death. [KNIGHT BRUCE, L. J. That observation is very material.]

H. C. Jones, for the personal representative of the two cousins who died in the widow's lifetime, one of whom survived the sister. The first part of the gift, taken alone, would give vested interests to all cousins living at the testator's death. *Middleton v. Messenger*, 5 Ves. 136. That the gift is to take effect on a contingency does not alter the rule. *Bird v. Luckie*, *ubi sup.* The subsequent words do not make the class ascertainable *in futuro*; for "them" is referential, and shows that the cousins whose issue were to take were themselves objects of the gift. See *Gray v. Garman*, 2 Hare, 268; 7 Jur. 275. The gift to the issue is substitutionary; and there being no issue, the original gift remains undivested. *Harvey v. M'Lauchlan*, 1 Price, 264; *Salisbury v. Petty*, 3 Hare, 86; 7 Jur. 1011. If, however, the class is to be ascertained *in futuro*, it should be at the death of the sister, for the contingency on which the testator gives the property to his cousins is the failure of issue of himself and sister, which took place on his sister's death.

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Sandys, for the personal representative of the widow. The gift over, after the limitations to the sister and her issue, is void as to the personal estate. If not, then the shares of the cousins vested at the death of the testator; and the limitations over in favor of their issue having failed, the shares of those who died without issue in the widow's lifetime are undisposed of. If, however, the court is against me on both these points, the widow is entitled to a share as a first cousin, though she was tenant for life.

[KNIGHT BRUCE, L. J. Nobody seems to dispute that.]

Wickens, for the Attorney-General.

Roll, in reply.

KNIGHT BRUCE, L. J. The testator in this case neither at the time of making his will nor at any time afterwards had any issue. His sister survived him, but died without having ever married; and she was survived by the testator's widow, who recently died. Applying my observations to that state of things, and looking at every word of this will from beginning to end—that is, not alone at the passages immediately concerning the gift with which we are now dealing, but at those also which immediately concern the postponed legacies—I think, whatever be the construction of the gift to the testator's first cousins in other respects, it was not void for remoteness, either as to the real or personal estate of the testator, but fell within the rules of law. The next question is as to the meaning of the gift "to my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and not as tenants in common, their heirs, executors, administrators, and assigns forever." There may be room for doubt, possibly at least for reasonable argument, as to what the testator meant by those words, but there is not sufficient strength in the expressions to warrant the court, in my opinion, in departing from that which is the presumption of the meaning, namely, that it takes in all persons who answer the description of first cousins on the mother's side, either at the death of the testator or afterwards, before the period of distribution, which period here has happened to be the death of the widow. I think that, as in *Walker v. Shore*, 15 Ves. 122, and various other cases before and after that case, the effect of those words, "my first cousins by my mother's side," if standing alone, would be to give title to all the first cousins on the mother's side to participate, whether consisting only of those living at the death of the testator, or consisting of those and any which might be added to them by subsequent births before the period of distribution, which subsequent births did not happen in the present case. There is not sufficient to limit them to such cousins only as should be living at the period of distribution. Then comes the question, of some difficulty, as to the meaning of the words "and the issue of such of them as shall happen to be dead"—words which in my view of the will, can only apply to one fourteenth share, there having been only one of the fourteen cousins who died before the death

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of the widow, leaving issue. It seems to me to be a difficult question whether that fourteenth share belongs to the personal estate of the first cousin who so died, or to the issue of that first cousin; but I understand the record to be so constructed that we cannot decide that. Whatever decree, therefore, is drawn up, must be a decree raising and keeping open that question, which we are not now in a condition to decide. I need hardly add, that whatever in some instruments, may be the meaning to be ascribed to the term "first cousin," in this particular will, the testator himself has shown that he means by that term only the children of uncles and aunts, using those terms in the simplest and strictest meaning of the expressions.

TURNER, L. J. I concur in the view which has just been stated. I think the testator clearly intended that, in the event of the death of his sister leaving no issue, the corpus of the property in which she was to have a life interest was to go to his first cousins. I collect that, from his having given legacies to certain of his first cousins, on condition only that he and his sister should both die without leaving issue. I think, that on the reasonable construction of the will, the residue is to go on the same condition as the legacies do; and the question therefore is, what persons are to take under the bequest, "I give and devise to my first cousins by my mother's side, and the issue of such of them as shall be dead, &c. Now, an argument was attempted to be derived from the gift of legacies to several of the first cousins as importing that they were not intended to take the residue. The parties, however, to whom legacies are given are only some of the first cousins; and the gift of legacies, being to some only, merely imports a preference to them; it does not show that those living at the testator's death are not to take the residuary estate. The inference from convenience is, that the same rule should be applied which applies to bequests to children, and by which afterborn children are let in. It has been argued, however, that the same rule does not apply to extend a bequest to first cousins. That argument was not supported by authority, and I am not disposed to attribute much weight to it. I do not see by what we are to be guided, if in the case of a gift to a class of relations, that which is held a wise rule with regard to one grade of relationship is not to be so held with regard to another.

Another argument was attempted to be founded on the words of futurity occurring in the bequest; and it was said that those words import futurity in the gift. No doubt words may be used which indicate an intention to refer to a class which shall exist only when distribution is to take place; but I think myself, that, according to the modern authorities, strong words are necessary for that purpose. The modern authorities go on the principle, or on the view taken in the case in which it has been held, that where a testator mentions next of kin he must be considered as meaning the gift to go according to law. The principle is stated in *Seifferth v. Badkam*, 9 Beav. 370. What is said there is, "At the time the will is made, it is necessarily uncertain who will be the testator's next of kin at the time of his

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death. If at the date of his will he has children who are his next of kin, they may die before him, and give place to his brothers and sisters. If at the date of his will he has brothers and sisters, he may afterwards have children born who, at the time of his death, may displace the brothers and sisters. Contingencies of this sort are infinite, and in general it is perhaps probable that the testator, in such cases, means only to provide for those whom he does mean, to benefit in the way he thinks best, and then to add, that if events defeat that particular intention, the law may take its course. It is, indeed, quite unnecessary to express that, because the law will make its distribution without any direction; but it seems to me more probable, and more in conformity with the ordinary habits of men, that he should use that expression, though unnecessarily, than that he should have meant a benefit to the particular persons who might chance to be his next of kin."

According to that reasoning, which is adopted in *Jenkins v. Gower*, 2 Coll. 537, and in all the subsequent cases of a gift to next of kin, the leaning of the court always is to give it to the objects living at the time of the death of the testator, subject to open so as to let in objects subsequently born before the period of distribution; and I think the same rule should be observed in the case of a gift to first cousins. I do not think it necessary, however, to decide this question now, for, in truth, no words of futurity are here annexed to the gift to first cousins. The gift is, "to my first cousins by my mother's side." Stopping there, the gift is a simple gift to first cousins, which would carry the property to all the cousins living at the testator's death, subject to letting in those afterwards born before the period of distribution. Then come the words "and the issue of such of them as may happen to be dead;" but those words only refer to, and do not modify or alter, the class entitled under the previous words.

ASHLEY v. SEWELL.¹

March 22, 1853.

Chancery Practice Amendment Act — Jurisdiction under Sect. 45.

A married woman, donee of a general power of appointment over personal property comprised in her marriage settlement, by her will appointed, gave, and bequeathed all the personal estate, which by virtue of any power or authority, or by virtue of any separate right of property, she was competent to dispose of, to her executors therein named, upon certain trusts. Upon the death of the testatrix, probate of the will was granted to the executors, limited to the testatrix's interest in the property over which she had a power of disposition

¹ 17 Jur. 269.

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given to her by the deed creating the general power, and which by the will she had appointed and disposed of accordingly, but no further:—

Held, that the court had jurisdiction, under the 45th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, to entertain an application, by a beneficiary under the will, for a summons, requiring the executors named therein to show cause why an order for the administration of the personal estate of the testatrix should not be made.

By the marriage settlement of Margaret Cleave, dated in August, 1845, a sum of 1,300*l.* stock in the 3*l.* 5*s.* per cent. annuities, and sixty-seven shares in the British Commercial Insurance Company, were assigned to trustees, upon trust for the separate use, without power of anticipation, of Margaret Cleave, for her life; and after the death of her husband, in case she should survive him, in trust for the said Margaret Cleave, for her own use and benefit, absolutely; but in case she should die in the lifetime of her husband, then in trust for such persons and for such uses as she, the said Margaret Cleave, should by deed or will (notwithstanding her coverture) appoint; and in default of such appointment, then upon the trusts therein mentioned.

By an indenture, dated in July, 1850, and made upon the occasion of the separation of Mr. and Mrs. Cleave, the husband covenanted with the trustees therein named (*inter alia*) that it should be lawful for Margaret Cleave, notwithstanding her coverture, to have, hold, and enjoy, to her separate use and benefit, independently of her husband, certain articles of household furniture, which her husband thereby agreed to give up to her, and all the moneys, clothes, linen, household goods or other goods, real and personal estate, chattels, and effects, of what nature or kind soever, vested, contingent, or reversionary, which the said Margaret Cleave then had or might thereafter have in her power, custody, or possession, or which she might at any time thereafter purchase, acquire, or be possessed of, or which might be given or bequeathed to her, and at all times to give, bequeathe, order, manage, direct, sell, or dispose of the same, or any of them, in such manner, to all intents and purposes, as if she were a *feme sole*. Margaret Cleave afterwards, by her will, dated the 17th January, 1851, appointed, gave, devised, and bequeathed all her household goods, and furniture, plate, linen, &c., and all the residue and personal estate which by virtue of any power or authority, or of any separate right of property, she was competent to dispose of, to the trustees therein named, upon trust to convert and invest, and then to apply the annual income arising from the resulting investments and securities for the maintenance and education of M. S. Sewell during her minority, with a direction to accumulate the unapplied income, if any for her benefit; and after the said M. S. Sewell should have attained the age of twenty-one years, then upon trust to convey all the said property of the testatrix to the said M. S. Sewell, her heirs, executors, administrators, and assigns, absolutely.

Margaret Cleave, the testatrix, died on the 10th April, 1851, leaving her husband surviving; and on the 23d May following probate of her will, limited so far as concerned all the right, title, and interest of the testatrix in and to all such personal estate and effects as she, by virtue of the said above-mentioned indentures of marriage settlement

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and separation, had a right to appoint and dispose of, and had in and by her said will appointed or disposed of accordingly, but no further or otherwise, was granted to the executors named in the said will. On the 21st January, 1853, M. S. Sewell, the infant legatee named in the will of Margaret Cleave, by her next friend, applied to the Master of the Rolls for a summons, under the 45th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, requiring the executors of Margaret Cleave to attend before him at chambers for the purpose of showing cause why an order for the administration of the personal estate of the testatrix, Margaret Cleave, should not be granted. Upon it appearing that an order had been refused, under similar circumstances, in the case of *In re White's Estate*, (not reported,) by Sir R. T. Kindersley, V. C., on the ground that the act did not give him jurisdiction to make one, Sir J. Romilly, M. R., requested that question should be submitted for the opinion of this court.

W. M. James, Q. C., and *Kinglake*, in support of the jurisdiction. It will be very inconvenient if the statute should be held not to apply to a case of this nature, and the only result will be, that the legatee will be put to the more expensive course of filing a bill or claim. Sir R. T. Kindersley, V. C., in refusing the application in *Re White's Estate*, proceeded on the ground that the proceeding by summons, under the 45th section of the statute, applied only where the application was in effect to have the general personal estate of the deceased person administered, and that in the case before him the application was in effect to have administered, not the general personal estate of the donee of the power, but the trusts of the deed creating the power. It is submitted, however, that the donee of the power, by the exercise of the power, had in effect made the property, the subject of the power, part of her general personal estate. It was so held in *Goodere v. Lloyd*, 3 Sim. 538; 1 Sugd. Pow. 536; and it appears to have been so considered by the Ecclesiastical Court in the present case, for the grant made to the executors is not of letters of administration with the will annexed, but of probate.

Knight Bruce, L. J. It is admitted, that the object of the present application can be obtained by the more expensive course of filing a bill or claim. What difference can it make to proceed under the statute? My only doubt is, whether the husband should not have been served.

Roundell Palmer, Q. C., and *Prendergast*, contra. It is submitted that there is no jurisdiction given to the court, by the 45th section of the statute, to make an order which does not extend to the general personal estate of the deceased person; and that no such order can be made where the administration is limited to a particular property. Here the property sought to be administered is not the general personal estate of the deceased person. The testatrix, being a married woman at the time of her death, could have no general personal estate, and therefore the Ecclesiastical Court has limited the grant of probate

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to the interest which the testatrix had under the instrument creating the separate property. The defendants are not executors or administrators of the deceased in the sense meant in the statute, but appointees named by the donee of the power. This is shown by the fact, that a nominal duty only is required to be paid on taking out a probate so limited. It is contended, that any decree or order to be obtained from the court must be a decree or order, not for the purpose stated in the statute, of administering the trusts of this lady's will, but of administering the trusts of the settlements creating the power. Before it will do this, the court will require those instruments to be proved in the usual manner. It will not act simply upon the production of probate of a will made in exercise of a power. *Rich v. Cookell*, 9 Ves. 376; *Ledgard v. Garland*, 1 Curt. 286. All that has been produced here as a foundation for the order, is the limited probate taken out by the defendants. The husband has not taken out an *administratio ceterorum*, and he is not before the court; but it is submitted, that if the accounts are to embrace choses in action not reduced into possession by the lady, her husband, as the only person entitled to general administration, should be present. Under the practice upon bill or claim, before the passing of this statute, no such accounts would be directed in his absence.

KNIGHT BRUCE, L. J. The next friend of the infant legatee in this case has asserted, in a compendious and inexpensive mode, that which, beyond all possibility of question, he has a right to ask and obtain, by a longer and more expensive mode, in this court; and it would therefore be a matter of great regret if the convenient and useful enactment which he asks to have applied to his case should not be so applied. I am of opinion, however, that it would be a narrow construction of the section in question of the statute to hold that it does not extend to this case. I think this case is within the letter and the spirit of the statute; and as I believe my learned brother takes the same view of the question as myself, we must request counsel to inform the Master of the Rolls, with our best respects, that we consider that he has jurisdiction, under the 45th section of the statute, to entertain this application. With that intimation of our opinion, the case will be remitted for the consideration of his Honor, whether the jurisdiction should be exercised, and to what extent, and in the presence of what parties exercised, upon the application before him.

TURNER, L. J., concurred.

Burgess v. Burgess.

BURGESS v. BURGESS.¹

March 18, 1853.

Injunction — Trade Marks.

Where the manufacturer of an article of trade sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself.

FOR upwards of forty years prior to 1800, John Burgess, deceased, the father of William Robert Burgess, the plaintiff, carried on business on his own account, as an "Italian warehouseman," at a shop or warehouse at No. 107, Strand. In 1800 the plaintiff was taken into partnership in the business by his father, and from that time till 1820, when the father died, they continued to carry on such partnership business under the style or firm of "John Burgess & Son." The son, who was the sole executor and residuary legatee named in the will of his father, then succeeded to the business, which he had ever since continued to carry on, on his own sole account, but under the same style of "John Burgess & Son," and on the same premises, at No. 107, Strand. Amongst the articles in which the firm originally, and afterwards the plaintiff, had been in the habit of dealing was a fish sauce called "Essence of Anchovies," which had been originally manufactured by John Burgess, the father of the plaintiff, about forty years prior to 1800, and which had been ever since sold by him, and the firm, and the plaintiff, under the name of "Burgess's Essence of Anchovies." The defendant, William Harding Burgess, the son of the plaintiff, after being for many years employed, at a salary, upon the business premises in the Strand, by his father, in May, 1851, upon the occasion of a disagreement between the two, left his father's service, and commenced trading on his own account, as an Italian warehouseman, at No. 36, King William-street, City.

The bill alleged that the defendant, for the purpose of leading the public to believe that he was the same Burgess as the plaintiff, and that the business carried on by the defendant in King William-street was the same business as that carried on by the plaintiff in the Strand, or an offset or continuation of such business, had caused to be placed over his shop-front, in King William-street, the words "W. H. Burgess, late of 107, Strand," and on each side of the door of such shop or warehouse had caused to be fixed a metal plate, with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand;" and it complained also that the defendant was selling a fish sauce purporting to be "Burgess's Essence of Anchovies," but at a lower price

¹ 17 Jun. 292.

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than that of the article sold by the plaintiff under the same description or title, and that such sauce was offered for sale by the defendant in bottles similar in size and shape to the bottles used by the plaintiff, accompanied by labels, wrappers, and catalogues bearing a general resemblance to those used by the plaintiff in the sale of his essence of anchovies; and in particular, that upon such labels, wrappers, and catalogues the essence of anchovies sold by the defendant was described as "Burgess's Essence of Anchovies," a title under which the article sold by the plaintiff was well known, and had long enjoyed a great celebrity in the market.

The bill then charged that the labels, wrappers, and catalogues so used by the defendant, and particularly the words "Burgess's Essence of Anchovies" printed thereon, had been adopted and used by the defendant with the fraudulent object of deceiving the public, and leading persons purchasing the sauce manufactured and sold by the defendant to believe that they were purchasing the essence of anchovies manufactured and sold by the plaintiff, and which was commonly known as "Burgess's Essence of Anchovies." The bill prayed that the defendant might be restrained by injunction from having or continuing on his shop-front the words "late of 107, Strand," and from having or continuing on the sides of the door of his shop any plate containing the words "Burgess's Fish Sauce Warehouse, late of 107, Strand;" and also from selling or disposing of, or causing to be sold or disposed of, any sauce, essence, or composition manufactured by or for him, the defendant, and described as, or purporting to be, or represented as being "Burgess's Essence of Anchovies;" and from printing or using those words, as descriptive of the article manufactured by himself, either upon labels or wrappers used with the bottles in which the article was sold by the defendant, or in the advertisements, circulars, or catalogues published by the defendant.

Upon motion being made, on the 5th October, 1852, before Sir R. T. Kindersley, V. C., for an injunction in the terms of the prayer of the bill, his Honor granted an injunction restraining the defendant from continuing over his shop-front the words "late of 107, Strand," and from continuing on the sides of his shop-door the plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand," but refused the rest of the motion. The plaintiff now moved, by way of appeal from the order of the Vice-Chancellor, for that part of the injunction sought which had been refused by his Honor.

F. Thesiger, Q. C., Campbell, Q. C., and W. R. Moore, in support of the appeal motion. The question here is simply, whether the plaintiff has acquired a title to the exclusive use of the words "Burgess's Essence of Anchovies," to designate the article manufactured and sold by himself, or whether any other persons may use the same words for describing a similar article manufactured and sold by themselves. It is submitted that the plaintiff has a right to have it exclusively appropriated to his own manufacture. If the question had arisen between the plaintiff and a person not named Burgess, it does not admit of a doubt that an injunction would have been granted, and

that on the ground, that by long user the plaintiff has obtained a property in the title in question. So, where the defendant is of the same name as the plaintiff, but not related to him. Thus in *Sykes v. Sykes*, 3 B. & Cr. 541; 5 D. & Ry. 292; the plaintiff made shot belts and powder flasks with the words "Sykes's patent" upon them, although the patent-right had expired; and the defendants (one of whom was named Sykes) having marked similar goods manufactured by them with a stamp bearing the same words, and closely resembling the plaintiff's mark in every respect, it was held that an action would lie, although the defendants did not sell the goods as being the plaintiff's manufacture. And it is not necessary to show that the article sold by the defendant is inferior to that sold by the plaintiff. Thus, in *Blofield v. Payne*, 3 B. & Ad. 410; where the declaration stated that the plaintiff used certain envelopes for metallic bones, of which he was the inventor and manufacturer, which envelopes the defendants imitated upon inferior bones, selling them as the plaintiff's, whereby the plaintiff was prevented from selling many of his bones, and they were depreciated in value and reputation, it was held that the plaintiff was entitled to damages, although he did not prove that the defendant's bones were inferior, or that he had sustained any specific damage. It is submitted that the fact of there being relationship between the parties can make no difference in the principle on which the cases go, namely, of a property or exclusive right in the plaintiff to the use of the mark or title in question.

[KNIGHT BRUCE, L. J. The law upon this subject is as old as Popham's Reports. See *Southern v. How*, Poph. 143, 144.]

The principle upon which this court interferes in such cases by injunction is clearly laid down in the case of *Croft v. Day*, 7 Beav. 84; where Lord Langdale is represented as expressing himself to the following effect:—"No man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with, and selling the manufacture of, such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany it with such other circumstances as to effect a fraud upon others." See also *Perry v. Truefit*, 6 Beav. 66. It is true that in those cases Lord Langdale held that there could not be an exclusive right or property in the use of a trade mark or name, but that fraud on the part of the defendant in the use of the mark or name was a necessary ingredient to entitle the plaintiff to an injunction.

Burgess v. Burgess.

In the case of *Millington v. Fox*, 3 My. & C. 338, however, the court held that there is a title to trade marks independently of fraud, and that fraud in the imitation of such mark is not necessary to entitle the owner to protection. In that case the plaintiffs had used certain marks on steel manufactured by them for a great length of time; the defendants had used the same marks, in ignorance of the fact of any exclusive claim by the plaintiffs, or even of the existence of the plaintiffs; and it was proved that the use of those marks was, in the trade, very generally considered as indicative, not of particular makers, but of particular qualities of steel. Lord Cottenham, in giving judgment, after observing that he had come to the conclusion, upon the evidence, that the plaintiffs had a title to the marks in question, said — "In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of their right to the exclusive use of those names." And his lordship therefore decreed a perpetual injunction. [They cited also *Lewis v. Langdon*, 7 Sim. 421, and *Knott v. Morgan*, 2 Kee. 213.]

James Bacon, Q. C., and *May*, contra, were not called upon.

Knight Bruce, L. J. All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell them in their own name, and not the less so that they bear the same name as their father; and nothing else has been done in that which is the question before us. The defendant follows the same trade that his father follows and has followed, namely, a manufacturer and seller of pickles, preserves, and sauces, among which is one called "Essence of Anchovy." He carries on business under his own name, and sells essence of anchovy as "Burgess's Essence of Anchovy," of which name it is. If any circumstances of fraud, now material, had accompanied and were continuing to accompany the case, it would stand very differently; but, as has been very correctly said, the whole case lies in what I have stated; and the only ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovy. That does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovy, and selling it under his own name. Not any of the cases cited show that there is here any ground for an injunction. Here, even had I a doubt upon the matter, it would be impossible, I think to accede to the present motion — a mere interlocutory motion, by way of appeal, notice of which is not given till March, from an order made in the preceding October. I think this motion should be refused, with costs, with liberty to the plaintiff to take such proceedings at law as he may be advised.

TURNER, L. J. I concur in the opinion that the motion should be refused. It is clear no man can have any right to represent his goods

Aveling v. Martin.

as the goods of another; but in all cases of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under his own name, and another person, not having that name, is using it, it is clear that he so uses it to represent the goods sold by himself as the goods of another; but where the two persons have the same name, it does not follow, that because the defendant sells goods under his own name, and it happens that the plaintiff has the same name, he is selling goods as the goods of the plaintiff. Looking at the evidence here, it is clear, that since the order made by the Vice-Chancellor, no representation has been made, on the part of the defendant, that the goods he is selling are the goods manufactured by the plaintiff. I think this motion must be refused, with costs, the plaintiff having liberty to apply to a court of law, as he may be advised.

Appeal dismissed, with costs.

Aveling v. Martin.¹

March 18 and 23, 1853.

Practice under the Stat. 11 Geo. 4 & 1 Will. 4, c. 36, r. 12 — Contempt — Defendant — Service.

Notice of motion for an order, under the 12th rule of stat. 11 Geo. 4, & 1 Will. 4, c. 36, for the defendant to remain in custody, until an answer or further order should be served upon the defendant.

H. F. BRISTOWE moved in this cause *ex parte*, that the defendant, Matthew Martin, might remain in custody until answer or further order, but without prejudice to the plaintiff availing himself of any of the provisions of the act of the 11 Geo. 4, & 1 Will. 4, c. 36. The circumstances under which the motion was made, were as follows:— A suit was instituted for the administration of the estate of one William Holmes, deceased, who by his will had given and devised his real and personal estate to three trustees, the defendant, Matthew Martin, William Martin, and one Johnson, upon certain trusts; and he appointed them his executors. They all proved the will, and the bill alleged that they had from time to time possessed themselves of large sums of money arising from the testator's estate. It was also alleged that Matthew Martin and Johnson, the trustees, had advanced

¹ 17 Jur. 271.

Aveling v. Martin.

to William Martin, their co-trustee and co-executor, a sum of 1,000*l.*, part of the testator's estate, upon the security of a mortgage of about 150 acres of land, which was alleged to be an insufficient security, it being charged with a prior mortgage for 4,400*l.* The bill further alleged that considerable sums of money, further part of the testator's estate, had, with the privity of Johnson, been lent by Matthew Martin to his brother and co-trustee, William Martin, without any security. It appeared that William Martin was dead insolvent, and that Johnson was also dead. The bill sought discovery from the defendant, Matthew Martin, the surviving trustee and executor, as to the amount of the testator's estate which had been advanced to William Martin; and also as to whether such advances were or were not made with the privity of the deceased trustee, Johnson, whose personal representative had put an answer, saying that Johnson, the trustee, had never acted in the trusts otherwise than in signing receipts for conformity, and saying that he, the personal representative, knew nothing of the matters alleged by the bill. Matthew Martin, not having put in his answer, and being in contempt for want of it, was attached and was brought up to the bar of the court, and examined by Sir R. T. Kindersley, V. C., as to why he had not answered, and, giving no satisfactory reason, he was handed over to the keeper of the Queen's prison. The plaintiff, however, being unable to obtain the discovery sought by the bill, and which was required with the view of charging the solvent estate of Johnson, the deceased co-trustee of the defendant, Martin, had on the 18th March moved, before their lordships, (who had consented to take pressing matters from the court of Sir R. T. Kindersley, V. C.,) in the terms of the 12th rule of the 15th section of the act 11 Geo. 4 & 1 Will. 4, c. 36.¹ The motion was made *ex parte*, on the authority of the case of *Maitland v. Rodger*, 14 Sim. 92; but their lordships thinking that notice of the application had better be served on the defendant, the case was directed to stand over for that purpose. This having been done, and an affidavit of service having been made, the motion was this day (March 23) renewed, whereupon their lordships made the order.

¹ The 12th rule enacts, "that in any case where, upon the application of the plaintiff, the court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill or to the interrogatories from the defendant himself, it shall be lawful for the court to order the defendant to remain in custody until answer or further order, but without prejudice to the plaintiff availing himself of any of the provisions of this act."

Havens v. Middleton.

HAVENS v. MIDDLETON.¹

March 11, 1853.

Lessor and Lessee — Covenant to insure.

Lessee covenanted to insure the demised premises in the joint names of the lessor and lessee. The premises afterwards became vested in an underlessee, who insured in the name of the original lessor alone, or of his representatives. It was not known whether the original lessee was alive or dead, or who was his representative:—

Held, that this was a sufficient compliance with the covenant, so as to prevent the lessor from taking advantage of a proviso in the lease, for reentry on non-performance of the covenants.

THE question in this case was, whether or not there had been a breach of a covenant to insure, in a lease. The covenant was by the lessee, for himself, his heirs, &c., to insure the premises in the joint names of the lessee and the lessor. The insurance was in the name of the lessor alone. The premises were originally demised by a person named Child to a person named Plaskett, for a term of eighty years, with a proviso for re-entry on non-performance of the covenants, &c.; and were now vested in the plaintiffs, as trustees for sale, for the original term of eighty years, minus one day. The plaintiffs had accordingly contracted to sell to the defendant, who had paid his deposit. The defendant took the objection that the covenant to insure had not been properly observed, and that a good title could not be made, and brought an action to recover his deposit money. The plaintiffs now moved to restrain that action, their bill being filed also for a specific performance of the contract. The other facts and the arguments sufficiently appear in the judgment.

Rolt and Rudall, for the plaintiffs.

Bacon and Hislop Clarke, for the defendant.

WOOD, V. C. The premises being vested in Plaskett for eighty years, he demised, by way of underlease, to the parties represented by the plaintiffs, reserving the reversion of one day. The parties who have taken the underlease have insured in the name of the original lessor. So far as that insurance goes, it is not a strict compliance with the covenant. A party covenanting to insure in one name is not to insure in another name, or to put his covenantee in a worse position than has been stipulated for. In consequence of the correspondence, the present vendor procured from the lessor a receipt in this form, namely, for a quarter's ground-rent, "the policies of insur-

ance having been this day produced to me, and approved of." I apprehend, therefore, that the lessor having at the time of giving the receipt approved of the insurance, he could not even at law bring ejectment in respect of what had occurred up to that time, although this receipt was not under seal.

In *Doe v. Gladwin*, 6 Q. B. 953, the lessor of the plaintiff, who was the assignee of the original lessor, recovered the premises in consequence of the subsequent breach; it was not denied that the original lessor had by his conduct waived past breaches. I think, therefore, that in this case the original lessor would not be entitled to recover in ejectment. But then it was said that this difficulty has arisen in consequence of there not having been a literal performance of the covenant; that Plaskett, who has the reversion of one day, is not to be found, and that there may be some remedy on the part of Plaskett in respect of any future breach: that the name of Plaskett cannot be used to effect this insurance, and literally to comply with the covenant: and that he might recover in an action against his sublessees, the plaintiffs, or parties claiming under them, in case of non-performance. As to Plaskett himself, he has made a security; and there is in the subdemise by Plaskett no covenant on his part to perform the covenants in the original lease. He could not enter, neither could he bring an action of covenant. As to the original lessor, the case is somewhat different, for he could bring an action. I have not been able to find any case in which, the party covenanting that he would insure in the joint names of the lessor and lessee, it has been held that the lessor can complain because the insurance is affected in his own name only.

The two cases referred to, *Doe v. Gladwin*, 6 Q. B. 953, and *Penniall v. Harborne*, 11 Q. B. 368, do not bear out any such proposition. The first case I have already noticed. *Penniall v. Harborne* was exactly the reverse of the present case. There the lessee had covenanted to insure in the name of the lessor only, and he insured in the joint names of the lessor and himself, the lessee. That was held not to be a performance of the covenant. It was not so beneficial to the lessor as the arrangement for which he had stipulated; it did not give him the sole power over the moneys to be recovered; and if the lessee survived, it prevented the lessor from having any power over those moneys. In this case the insurance was to be in the joint names of the lessor and lessee. The introduction of the names of each was for his own benefit merely. No action can be brought, because the lessee has done something more simply beneficial to the lessor than he had stipulated for. If A covenanted with B to pay moneys in their joint names into a bank, and he pays the same in to the sole name of B, can B complain? This is the same case. In the other cases which were quoted¹ there was an inconvenience occasioned by the names of the lessor and lessee being joined. This

¹ See them quoted and commented upon in *Doe v. Gladwin* and *Penniall v. Harborne*.

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being the only objection taken, the defendant has very fairly waived all further resistance to the specific performance. But as he is a purchaser who has taken an objection which he has failed to maintain, he must pay the costs.

LEE v. LEE. LEE v. LYS.¹

March 23, 1853.

Pleading — Supplement.

After decree in the original cause, upon a defect of parties, an accounting defendant filed a supplemental bill to bring necessary (new) parties before the court. On a motion by the original plaintiff to take this supplemental bill off the file for irregularity:—

Held, that after a decree any accounting defendant has a right to file such a bill, to enable the decree to be duly carried out.

THIS was an administration suit, and there had been the usual administration decree. By the direction of the Master, one of the defendants had had the conduct given him of the accounts in the Master's office. In the course of the proceedings it was discovered that one of the parties to the suit had assigned his share before the institution of the original suit. Almost before this circumstance had come to the knowledge of the plaintiff, and before any delay had taken place, the defendant put this supplemental bill upon the file.

Murray now moved to take the supplemental bill off the file for irregularity. The text-books are uniform in limiting the right to the plaintiff alone. A defendant after decree can revive, but not institute a supplemental suit. *White on Revivor*. The inconvenience of a different rule would be very great, because the birth or death of any party interested in the matters in the cause would lead in almost every instance to a race between the different parties to get a supplemental bill on the file. At all events, the present plaintiff must show that the plaintiff in the original suit declined to prosecute the proceedings. *Phillips v. Clark*, 7 Sim. 231, and *Dixon v. Wyatt*, 4 Mad. 392, show that the present bill ought to have had the previous permission of the court.

Speed, contra. After decree, all the parties in the cause have an interest in carrying on the suit, either by revivor or supplement, or both.

[Wood, V. C. As to revivor, a defendant has an undoubted right.]
And nothing has ever been decided against a defendant's right to

¹ 17 Jur. 272.

Lee v. Lee; Lee v. Lys.

bring forward supplemental matter. *Phillipps v. Clark* is no authority, for the defendant in that case had no right to file a bill at all. *Dixon v. Wyatt*, 4 Mad. 392; *Williams v. Chard*, 5 De G. & S. 9; s. c. 7 Eng. Rep. 289. The general rule is, that all parties interested in a decree have a right to bring before the court all persons necessary to give them the benefit of the decree. The exception is, that persons interested in the decree, but not parties to the record, as creditors, next of kin, &c., coming in and proving before the Master, but not named on the record, have not that right. *Devaynes v. Morris*, 1 My. & C. 225, is an express authority for the propriety of the present supplemental bill. So is *Cattell v. Corroll*, 1 Hare, 216.

Murray, in reply.

[WOOD, V. C. *Devaynes v. Morris* appears to have been more than a mere bill of revivor; it was against a devisee. That is supplement. If it had been against an heir or executor, it would have been of little weight against your present application.]

Both the plaintiffs there were dead: there was no person in existence named on the record except the defendant: no step has been taken for two years. That is a case very different from the present. The bill in that case was not properly either a supplemental bill or bill of revivor; it was an original bill, in the nature of a supplemental bill or bill of revivor. Such a case, authorizing an original bill, does not justify the present defendant filing a purely supplemental bill. In *Cattell v. Corroll* the plaintiff had become insolvent. Here the plaintiff is *sui juris*, and competent to take care of his own interests.

WOOD, V. C. I think that the case of *Devaynes v. Morris* goes the whole way of settling the practice. In that case a bill of revivor and supplement was filed in December, 1834, which prayed relief against the representatives of Booth and his assignees, as if they had been originally made parties to the original bill. That is completely supplemental. It was brought before the notice of Lord Cottenham that it was a case in which a hearing would be necessary — that a decree would be necessary; and with all that before him, he made this order. He certainly contemplated the case of a suit becoming defective as well as abated." It is clear that a defendant, who is a party to the accounts directed by the decree, is at liberty, upon the suit becoming defective, to file a bill for the purpose of restoring the suit to that state which is necessary in order to a due prosecution of the decree." This authority seems in point, and I must refuse the present motion, with costs.

Jacobs v. Jacobs.

JACOBS v. JACOBS.

March 7, 1853.

Will—Construction—Substitution.

S. S., who died in 1821, by her will bequeathed the interest of all her property, the same being wholly personalty, to F. S. for life; but in case she should die unmarried, then over to A. and B., "or to their heirs, as they may deem proper." B. died in 1835, leaving a widow and seven children, and having by his will bequeathed the residue of property to two of his sons. F. S. died in 1852, without ever having been married:—

Held, that the words "or to their heirs" were substitutional, and that consequently, as the property was personalty, the next of kin of B. took his share in equal proportions, the words "as they may deem proper" having no operation.

SUSANNA SAMUEL, by her will, dated the 15th June, 1818, after directing her executors and trustees to invest the whole of her property in the Government funds, proceeded as follows:—"I give and bequeathe to my daughter, Fanny Samuel, during her lifetime, the whole of the interest arising from all my properties of which I may die possessed; but in the event of my daughter, Fanny, marrying, then and in that case she is to receive the sum of 400*l.* as her proportion and marriage dowry, and the residue of my property is then to be equally divided between my son, Abraham Samuel, and my son-in-law, Henry Jacobs, or to their heirs, in such manner as they may deem proper. In the event, however, of my daughter, Fanny, remaining unmarried, it is my wish that after her demise, the whole of my property, invested as before directed, shall be equally divided between my son, and son-in-law before named, or to their respective heirs, in such manner, however, as they respectively may deem proper." The will also contained a direction that Abraham Samuel and Henry Jacobs, or their heirs, should, after becoming entitled, pay certain legacies to two grandchildren therein named. The testatrix died on the 16th January, 1821. Henry Jacobs died on the 19th October, 1835, leaving a widow and Levy Jacobs, his son and heir at law, and several other children. By his will, dated a few days previously to his decease, after making certain bequests, he bequeathed unto his two sons, Levy and Jonas Jacobs, all the interest he possessed in his trade, together with his stock in trade, book debts, and the residue of the whole of his property, Government securities, and other effects that he should die possessed of, to be equally divided between them, share and share alike. Fanny Samuel, the daughter of the testatrix, died on the 4th September, 1852, without ever having been married. Under these circumstances, a special case was prepared for the purpose of obtaining the opinion of the court on the construction of the will, and the following questions were submitted to it:—First, whether the bequest of a moiety of the testatrix's, Susanna Samuel's, residu-

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ary estate vested absolutely in the said Henry Jacobs upon the death of the said testatrix, so that upon the death of the said Henry Jacobs the right thereto passed to his executors; or whether the said legacy was divested by his decease in the lifetime of Fanny Samuel, the tenant for life, and, in that event, vested in the party or parties designated as his heirs. Secondly, what party or parties, in case of the latter construction being correct, was or were entitled to take under the designation of "heirs of Henry Jacobs;" whether Levy Jacobs, as his heir at law, or his next of kin within the meaning of the Statute of Distributions of the personal estates of intestates, or his next of kindred and blood; and whether, if the next of kin of either description were entitled, the class to take would be those answering the description at the death of Henry Jacobs, or those answering the description at the death of Fanny Samuel, the tenant for life. Thirdly, if the next of kin were entitled, whether the class were entitled to take as joint tenants or as tenants in common, and whether in the proportions prescribed by the statute for the distribution of the personal estates of intestates, or otherwise, and how.

Waley, for the plaintiffs, the children of Henry Jacobs, other than his heir at law, submitted that the gift was substitutional; and in the events which had happened, the next of kin were entitled to take in the proportions indicated by the Statute of Distributions. And he cited the following cases:—*Girdlestone v. Doe*, 2 Sim. 225; *Salisbury v. Petty*, 3 Hare, 86; *Gittings v. M'Dermott*, 2 My. & K. 69; *Vaux v. Henderson*, 1 J. & W. 388; *Doody v. Higgins*, 9 Hare, part 5, App. 22, and *De Beauvoir v. De Beauvoir*, 15 Sim. 163; 3 H. L. C. 524; s. c. 18 Eng. Rep. 1.

Jessel, for the defendants, the heir at law and executors of Henry Jacobs, argued that the words "or his heirs" were not substitutional in this case, but merely words of limitation, and that therefore the heir at law was the proper person to take the moiety of the residue of the property given by the will of Mrs. Samuel. He cited *Chipchase v. Simpson*, 16 Sim. 485.

ROMILLY, M. R. I entertain no doubt whatever that the gift of the moiety in this case to Henry Jacobs, or to his heirs, passed to his next of kin. The gift is substitutional, and as the property is personalty, I think it is impossible to read the words "or his heirs" in any other way than to mean next of kin. Were I to decide otherwise, I should overrule a long series of cases upon this subject. The subsequent words, "as they may deem proper," do not seriously affect the previous part of the will. The next of kin at the decease of Henry Jacobs are entitled, and they took as tenants in common, and not as joint tenants. The costs must come out of the whole fund, the difficulty having been created by the will of the testatrix.

 Richards v. The Scarborough Market Company.

RICHARDS v. THE SCARBOROUGH MARKET COMPANY.¹

March 8, and 12, 1853.

Practice — Solicitor and Agent — Change of Agent in the Cause.

Where a London agent was employed by a country solicitor under a special agreement, an order of course, obtained by the country solicitor to change the agent without disclosing the agreement, was discharged, with costs, for irregularity.

THE plaintiff's solicitor practised in the country, and he employed a London agent in this cause under a special agreement. Notwithstanding the agreement he obtained an order of course for changing the agent, but without disclosing the existence of the special agreement; and a motion was now made, on behalf of the agent to discharge that order for irregularity.

W. M. James, Q. C., and *Roxburgh*, contended that the 18th Order of October, 1842, did not apply to cases where there were special circumstances. *De Fencheres v. Dawes*, 5 Beav. 144. The fact, of the special contract was very material, and a concealment of it made the order of course irregular. In fact, the dismissal of the agent was a violation of the contract.

R. Palmer, Q. C., and *Chapman Barber*, in support of the order, contended that it was not necessary, on obtaining the order, to mention the existence of the contract, as no contract could take away the right to dismiss an agent. A party in a cause had a right to change his solicitor, by obtaining an order of course under the 18th Order of October, 1842; but if he required any thing further consequent upon that order, a special application to the court might be necessary. The solicitor could retain the papers until his costs were paid, but not longer. In this case the question was one between a solicitor and his agent, which the court would not take notice of, as the rights of the parties in the cause could not be affected by any contract between the solicitors. The country solicitor might be liable to an action for breach of his contract, but that could not be permitted to interfere with his right to conduct the proceedings in the cause in the best possible way for his client.

ROMILLY, M. R., said, that as a general rule, upon an application being made for an order of course to change the solicitor in a cause, if there were any special circumstances in the case they ought to be disclosed. He thought there were many cases in which the circumstances might be such as to disentitle a party to obtain an order of

Swallow v. Binns.

course to change his solicitor, as, for instance, in the particular case of a solicitor being directed by a testator to wind up his affairs; that circumstance would control the client's right to change the solicitor. In this case the application for the order did not emanate from the client, but from the country solicitor, for whom the solicitor in London had acted as agent. Undoubtedly, in such a case, no contract between the solicitors could interfere with the client's right of choosing and changing his solicitor; but here the client was not the party seeking to change the agent. If the facts with reference to the special contract had been mentioned when the order was obtained, would the registrar have drawn it up? He would consider the point whether the facts ought to have been stated to the registrar.

March 12. ROMILLY, M. R., said he was now of opinion that the existence of the special contract between the country solicitor and his agent ought to have been mentioned to the registrar when the order was applied for and obtained; and therefore, without expressing any opinion as to the right of a client to change the London agent in a cause, or whether a client might not have a different agent to the one whom the country solicitor generally employed, or whether the client could be bound by such an agreement between solicitors as had been stated to exist in this case, he was clearly of opinion that the existence of the agreement not having been mentioned to the registrar, the order of course must be discharged, with costs, but without prejudice to the right of the client to remove the agent.

SWALLOW v. BINNS.¹

November 25, 1852.

Practice — 15 & 16 Vict. c. 86, s. 44 — *Parties to a Suit.*

An act for the improvement of equity jurisdiction does not enable the court to proceed in the absence of all claimants on one side, but only at the discretion of the court in the absence of some of the claimants on one side.

RENSHAW stated a special case, in which infants were concerned. It appeared that the question arose under a settlement made in 1821, by Nathaniel Binns, upon a limitation to the children of George Binns. The question was, whether all the children of George Binns took who attained twenty-one or married, or whether those only took who attained twenty-one or married, and survived George Binns. Some children had attained twenty-one, and died in their father's lifetime. There was no personal representative to their estates. It

¹ 17 Jur. 295.

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was now asked to decide the question in the absence of any personal representative of these deceased children, or else that the court would permit the personal representative of their father to represent their interests.

TURNER, V. C. Under the 44th section of the act the court may either proceed in the absence of any personal representative, or appoint some person to represent the estates of these deceased children. But here the person proposed to be appointed may have an interest himself contrary to the interest which he thus represents. If the father survived these children, and they died intestate, upon satisfactory evidence of that, you can get an order under this section that the father's personal representative shall represent the estates of these deceased children.

Schwyn, for other parties, suggested that the court might have jurisdiction, under the 51st section, to determine the rights of the other parties in the absence of these parties.

TURNER, V. C. I think the 51st section only applies where there are some parties on each side present, so that every class is represented, although some of the persons composing that class may be absent.

VINCENT v. GODSON.¹

March 15, 1853.

Debt for Rent — Priority — Law of Jamaica.

A landlord, creditor for rent against the estate of a deceased tenant, is entitled to rank above the ordinary simple contract creditors, under a decree for administration. But this right arises out of the relation of landlord and tenant, and is founded on the sacred regard which the law of England shows to rights arising from tenure, and does not apply to a debt claimed against the estate of a deceased debtor, who had entered upon the land under an agreement of such a nature, that his entry did not create a tenancy at a certain rent.

Agreement to grant and accept a lease of property in Jamaica, from the 1st December, 1847, for twenty-one years, at the clear yearly rent of 2,000*l*, the lease to contain certain covenants. The tenant entered into possession, and died in August, 1849, without having paid rent:—

Held, that this agreement would not have been an actual demise before the 8 & 9 Vict. c. 106, and that the entry thereunder created no tenancy, so as to give the landowner a right of distress, or to make any privity of estate between him and the intended lessee, and that, therefore, the owner in such case had not this right of priority.

This curious result of the law of tenure does not apply to a demise of lands in Jamaica.

THE Master, by his separate report, dated the 27th July, 1852, made, in pursuance of the decree in this cause, found, that by an

¹ 17 Jur. 295.

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agreement in writing, dated the 11th October, 1847, and made between William Baron Ward of the first part, and Richard Godson, the testator in this cause, of the other part, the said William Baron Ward agreed to grant, and the said testator to accept, a lease of all those sugar plantations or estates, with the land thereunto belonging, known by the name of "New Yarmouth," in the parish of Vere, and "Whitney," in the parish of Clarendon, in the island of Jamaica, in the West Indies; and also all that pen or cattle estate called "Rymesbury Pen," in the said parish of Clarendon, in the said island; together with the messuages, boiling and curing houses, and other premises and plantations therein more particularly mentioned; to hold the same from the 1st December, 1847, for the term of twenty-one years, determinable by either party at the end of the first ten or fifteen years, on twelve calendar months' notice to be given by the party, at the clear yearly rent of 2,000*l.*, free from all taxes and deduction whatsoever, payable on the 1st December in each year of the said term, the first payment of such rent to be made on the 1st December, 1848: and it was thereby agreed, that in the said lease should be contained all the usual and proper covenants, and particularly covenants on the part of the said Richard Godson, his heirs, executors, administrators, and assigns, to pay the said rent, and all rates, taxes, assessments, and impositions whatsoever. And the said Master found that the said testator entered into the possession of the premises comprised in the said agreement, and continued in such possession until the time of his death.¹ And the said Master found that the said testator died in the month of August, 1849, having first made his will, whereby he bequeathed all his real and personal estate to his wife, the defendant, Mary Godson, and appointed her executrix thereof; and that by a codicil to his will, dated the 26th July, 1843, he appointed the defendant, William Bulkeley Hughes to be executor, without revoking the appointment of the said Mary Godson; and that the said William Bulkeley Hughes had alone proved the said will and codicil. And the said Master found that possession of the said estates was not delivered to the said Lord Ward until the month of December, 1849. And the said Master found that the said testator, after the first half year's rent had accrued due, from time to time admitted the claim of the said Lord Ward in respect of the said rent, and requested the said John Henry Benbow, on behalf and as the agent of the said Lord Ward, to give time for the payment thereof. The said William Baron Ward had agreed to accept a surrender of the said premises as from the 1st December, 1849. And the said Master found that no portion of the said two years' rent for the said premises, from the 1st December, 1847, to the 1st December, 1849, amounting to 4,000*l.*, had ever been paid to the said William Baron Ward, or to any person on his behalf; and that there was due to the said William Baron Ward from the estate of the said testator the sum of 4,000*l.*, being the amount of two years' rent of the said plantations, hereditaments, and premises

¹ In the former report, the finding was, that Godson entered "in pursuance of the agreement," but the date of entry did not appear.

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comprised in the said agreement of the 11th October, 1847, from the 1st December, 1847, to the 1st December, 1849, at the rate of 2,000*l.* per annum, as reserved and made payable in and by the said agreement; and that the said William Baron Ward was entitled as a specialty creditor on the estate of the said testator in respect of the said rent of 4,000*l.*; and the said Master allowed the same as a specialty debt on the estate of the said testator. To this report the defendant, Hughes, filed the following exception:— For that the said Master, by his said separate report, has found and certified that there is due to the Right Hon. William Baron Ward from the estate of Richard Godson, the testator in the pleadings of this cause named, the sum of 4,000*l.*, being the amount of two years' rent of the plantations, hereditaments, and premises comprised in the agreement of the 11th October, 1847, therein mentioned, from the 1st December, 1847, to the 1st December, 1849, at the rate of 2,000*l.* per annum, as reserved and made payable in and by the said agreement, and has allowed the same as a specialty debt on the estate of the said testator; whereas the said Master ought not to have allowed the said sum of 4,000*l.* as such specialty debt, but ought to have found any debt due to the said William Baron Ward from the estate of the said testator as a simple contract debt only. The testator, by letter, had admitted that the rent was due, and requested time to pay it.

Swanson, Q. C., and Goodeve, for the exception.

Russell, Q. C., and Gifford, for the plaintiff.

Malins, Q. C., and Renshaw, for Lord Ward. The debt for rent, though upon a parol demise, ranks as a specialty debt. But for the 8 & 9 Vict. c. 106, s. 3, this agreement, under the Statute of Frauds, would have been a lease. A tenancy at will was created by the entry upon the terms of this agreement, which, if rent had been paid, would have been converted into a tenancy from year to year. Accounting for and admitting a certain sum due for rent would produce the same effect; *Cox v. Bent*, 5 Bing. 185; and, therefore, there having been such an admission in this case, the debt is for rent properly so called,¹ and must rank as a specialty debt in the administration of assets in equity. *Clough v. French*, 2 Coll. 277.

¹ Where a tenant at will is liable to pay a certain rent, the lessor may distrain for it. (See Co. Litt. 55, b.) Entry under an agreement, which is void by the Statute of Frauds, creates a tenancy at will. See *Berrey v. Lindley*, 3 Man. & G. 512. And if the landlord give the tenant possession, and receive rent from him, under an agreement which is or is not so void, it is a lease upon the terms of the agreement. *Tempest v. Rawling*, 13 East, 17; *Doe v. Bell*, 5 T. R. 471. A mere entry without payment of rent, under a valid agreement not amounting to a demise, creates a tenancy at will, and the lessor may sue for the rent on a *quantum valebat*, but cannot distrain. *Hamerton v. Stead*, 3 B. & Cr. 478; *Hegan v. Johnson*, 2 Taunt. 148. In *Dunk v. Hunter*, 5 B. & Al. 322, Abbott, C. J., seems to intimate, that if, in such an agreement, the time of commencement of the tenancy and the amount of rent be certain, there might be a right of distress; but see, per Bayley, J., in the same case, *non constat*, that the same rent, agreed to be paid for a term, would be given for a tenancy at will; there-

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[STUART, V. C., called attention to the language of the decree in that case:—"Declare, that if the intestate, at his decease, was indebted to the plaintiff for rent under a demise of land, . . . such debt was entitled to priority of payment over the ordinary simple contract debts of the intestate." There might be degrees of simple contract debts, as wages for servants, or funeral expenses, which ranked first.]

In *Thompson v. Thompson*, 9 Price, 464, Wood, B., said, "I have been in error all my life, unless money due for rent in respect of land demised, whether by deed or parol, be not of fully equal degree with a specialty debt." The same view was supported by *Newport v. Godfrey*, 4 Mod. 44; 2 Vent. 184. It was there decided, that an executor might plead payment of rent, due on a lease by parol, to an action for a bond debt, because "this rent did savor of the realty." So, in *Stonehouse v. Ilford*, Com. Rep. 145, it is said, "debt for rent and upon specialty are in equal degree;" and *Willett v. Earle*, 1 Vern. 490, where the court was of opinion that such a debt, upon a parol demise, "did partake of the realty, and was therefore to be preferred to debts upon bond." So, *Gage v. Acton*, Com. Rep. 67; Ld. Raym. 515; 12 Mod. 288, per Holt, C. J., rent is of equal degree with a bond, "for if it be a lease by parol, it is in the realty."

[STUART, V. C. Those decisions proceeded on the law of tenure in England. How can you import that into Jamaica?]

A colony is governed by the laws of the mother country, Mem., 2 P. Wms. 75, and the exception of statutes passed after the colonization shows that the rule applies mainly to the common law. By the stat. 1 Geo. 2, c. 1, s. 22, it is enacted, that all such laws and statutes of England as had at any time been introduced, used, accepted, or received as laws in Jamaica, should be and continue its laws for ever. *The Attorney-General v. Stewart*, 2 Mer. 143.

Swanson, Q. C., in reply. This peculiar character of a debt for rent is an incident of the law of tenure. In this case there was no tenancy between the parties, for this was no lease, but an agreement only, even at law; therefore the money to be recovered is not rent. As to the law of Jamaica, *Noell v. Robinson*, 2 Vent. 358, showed that the English law did not apply to the plantations, for there land devised in fee was treated as a chattel to pay debts, "being in a foreign country." *Blanckard v. Galdy*, Salk. 411, decided expressly, that Jamaica being a conquered country, our laws did not take place there unless and until declared so by the conqueror or his successors, and even then Jamaica had power to vary them by enactments of its local government; and their own laws only ceased so far as repugnant to the law of God, and "the rule of natural equity" must supply all deficiencies.¹

fore the rent in such case is not certain, and there is no right of distress. And damages recovered in an action for use and occupation are not rent, but a compensation as an equivalent for rent. See *Naish v. Tallock*, 2 H. Bl. 317.

¹ Jamaica was captured from Spain in May, 1655. For a short summary of its constitutional history, see 1 Howard's Colonial Law, 19.

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STUART, V. C. Out of respect to the Master's judgment, who has come to the conclusion in his report that Lord Ward is to rank as a specialty creditor of the late Mr. Godson, I thought it necessary to hear the arguments throughout, but from the beginning I had little doubt upon the question. Godson, the testator in this cause, had entered into an agreement with Lord Ward to become tenant of his estates and plantations in Jamaica at a certain rent; and the essence of the agreement was, that a lease, with proper covenants, should be granted and executed by Lord Ward and Godson. Now, upon the authorities, it is not to be disputed, that if, with reference to land in England, the relation of landlord and tenant is existing, and the tenant at the death of the landlord, be indebted to the landlord in respect of rent, the landlord is entitled for that debt to rank above the ordinary simple contract creditors of his tenant. This was very carefully and accurately expressed by Sir J. L. Knight Bruce, V. C., in the decree in *Clough v. French*, 2 Coll. 277, in these terms — that a debt for rent, under a demise of land of which the party claiming the rent was seised, is a debt entitled to priority over the ordinary simple contract debts. In order to establish that right on the part of the creditor for rent, the claim must be for rent arising upon a demise. There must be a lease by parol or by written contract to create the relation of landlord and tenant, and to reserve rent.

Upon what principle the landlord was entitled to that right of priority, or to what extent it goes, is left in considerable doubt upon the authorities on the subject. Some judges have said, that a landlord, claiming rent from his tenant holding land by demise, is fully equal to a specialty creditor; but that a landlord can have all the remedies of a specialty creditor, or any remedy except that of a simple contract creditor to rank above all the others, I cannot find to have been anywhere decided. This extraordinary right given to the landlord is to be accounted for on the principle of tenure in the law of England, and the remedies which exist between landlord and tenant with reference to that relation.

The reason why a landlord has such a right of priority has been expressed by Holt, C. J., a great authority, to be, that the contract for the rent savors of the realty. And in another case he says it is a debt on real contract, and after the death of the tenant, the contract still remains in the realty. See 3 Lev. 267. All which expressions tend to show that it is a right arising, not from the law of contract simply, but from the law of tenure, which, in this country, preceded the law of contract. However difficult it may be to account for this priority even upon this principle, that it exists appears to be beyond doubt. It is like many other remedies arising from the relation of landlord and tenant, and founded on the sacred regard which the law of England shows to rights arising from tenure; for the extraordinary exceptions from the law of distress, the landlord's remedy on the clandestine removal of the property, and the right of the landlord against goods in the possession even of assignees of a bankrupt tenant, or trustees of an insolvent who has assigned it to trustees for his creditors; these are all rights existing at common law, and not by sta-

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tute, and are to be referred to the sacred regard which the law of England shows to rights arising by tenure.

The right of distress itself was not of that kind, but was introduced from the civil law, proceeding, in questions between landlord and tenant, upon the doctrine of hypothecation, treating the stock of the tenant on the land, of which he was merely the occupier, as something in which the landlord had a right by way of pledge. Not by statute, but by common lawyers, this doctrine of distress was imported into the law of England from the civil law. In order, then, to establish the right of the landlord to priority, it is of the essence of the right that there should be a demise. Without an actual demise, the law of tenure could not apply. There must be privity of estate beyond the privity of contract. It is on the principle of privity of estate that the right of the landlord, which Holt, C. J., says savors of the realty, must be maintained; and in order to maintain it, therefore, there must be an actual demise.

The counsel for the exception referred to the statement of the law on this subject by Eyre, C. J., in *Naish v. Tallock*, 2 H. Bl. 317, where emphatically he notices the distinction between the remedies where tenure does not exist, as between two individuals, one owing for occupation of the land of the other, and bound to pay for such use and occupation. In the case of an actual demise, the tenant holds the land of the landlord on the right of reversion. That is the case in which the contract savors of the realty; but mere occupation of the land, without a contract operating by way of demise, confers no such right on the landlord, or obligation on the tenant, as where a demise has actually taken place between them. Eyre, C. J., says, "The action for use and occupation is in its own nature collateral to the action for rent upon a demise, and it was so held in *Johnson v. May*, 3 Lev. 150; if the defendant did, in fact, use and occupy by the permission of the plaintiff, and had expressly promised to pay, though the plaintiff had no title, or an equitable title only, the action lay."¹ It is simply an action upon contract — on mere privity of contract — and not of estate. Therefore, in order to establish that right of priority, Sir J. L. Knight Bruce, V. C., prudently guarded his decree with a reference to the actual demise. There must be something which amounts to an actual demise — that is, a lease of the land.

In the present case, it was admitted by the counsel who support the Master's finding, that in the agreement between Lord Ward and Godson there were no words operating by way of present demise; it was simply an agreement for a lease, and the words were, that the future lease to be granted should be a lease containing proper covenants.

[*Malins, Q. C.* I only admitted that it was not a lease because of the stat. 8 & 9 Vict. c. 106.]

¹ Eyre, C. J., says further, that by this action, under stat. 11 Geo. 2, c. 19, "a landlord, who has rent owing him, is allowed to recover, not the rent, but an equivalent for the rent — a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise."

I think it is not, independently of that statute. It was most distinctly decided, in a case which was not referred to, which states the law very properly, that unless there is an actual demise, if the occupation be merely under an agreement for a lease, the landlord has no right to distrain, for that is a right incident to tenure. *Dunk v. Hunter*, 5 B. & AL. 322, decided that the landlord has no right to distrain unless there be an actual demise to a tenant at a fixed rent; and therefore, where a tenant was in possession under an agreement to let on lease for twenty-one years, with a purchasing clause, at the net clear rent of 63*l.*, the tenant to enter at any time on or before a particular day, it was held that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

Now, that case, with reference to a matter resting merely on a contract for a lease, seems to me exactly the case as it subsisted between Lord Ward and Godson, for the agreement between them was, that Lord Ward agreed to grant, and Godson to accept, a lease of certain described property, at a clear yearly rent of 2,000*l.*, free from all taxes; and it was agreed that the said lease should contain all usual and proper covenants, and particularly a covenant to pay the rent, &c. There were, therefore, no words of present demise in the agreement; but in law, as it stands, without reference to the recent stat. 8 & 9 Vict. c. 106, it could not be held to amount to a lease at all; and, therefore, it is a case in which the remedy of the landlord must be simply upon the law of contract, and totally independent of the real right or the real contract, to which such force has been attributed by Holt, C. J., and other judges. Even if this were an agreement for a lease of land in England, I should have great difficulty on the authorities in holding, there being no present demise, that Lord Ward, as landlord, had any claim to that priority recognized in various cases. In my opinion, that right of priority can only exist where the contract is in the realty, and not where there is a mere privity of contract, and not of estate. But the land being in this case in Jamaica, it seems to me impossible to treat the law of tenure in England, which gives these extraordinary rights, very peculiar in their nature, to the ownership of land in England, as applicable to Jamaica. Here, again, I find that the matter is concluded by authority.

There is a case of an action for rent of land in Jamaica, and the way in which such a case was treated by the courts of law in this country was, as I find it deliberately and distinctly stated, that in such a case, where a demise on an actual lease of land abroad, is the subject of remedy in England, it can only be upon the principle of an action founded upon the privity of contract, and not of estate. That was a case in which there was an actual demise, and therefore there was privity of estate, which, if it had been land in England, would have given that right of priority which, in my opinion, the Master has erroneously given in this case.

There is another case, *Way v. Yalley*, 2 Salk. 651; where a lessor abroad "brought debt for rent against the lessee, upon a demise at London of land in Jamaica. The defendant pleaded to the jurisdic-

Webster v. Webster.

tion of the court, that the matter ought to be tried in Jamaica. It was urged that a lessor cannot bring debt here against the assignee of a term in land in Ireland, and if entry and ouster were pleaded, it could not be tried here; and in this case the right of the plaintiff and defendant depended on foreign laws, which could not be given in evidence here. *Et per Curiam.*—Where an action is local, it must be laid accordingly; therefore, if the lessor declares on the privity of estate, and that lies in Ireland, the action must be brought there, for the estate is local; therefore such lessor cannot maintain debt here against an assignee of a term in Ireland, for the action is founded on privity of estate, otherwise where it is founded on privity of contract which is transitory." That is the law in a case of an actual demise of land in Jamaica, and all question of privity of estate is excluded from the principle on which the remedy is given. If maintained as a remedy, it must be an action on the privity of contract; and that is the case with which I have now to deal, for it is in this way that Lord Ward has a claim against the assets of Godson, under this contract. The contract itself is a mere agreement for a lease, on which, if the land were in England, there could be no right of distress, or equivalent rights, this being a matter remaining entirely in contract. I therefore can see no just principle on which I could hold that Lord Ward, under this agreement for a lease, on which he can only claim by privity of contract, and not of estate, can be ranked as a specialty creditor upon the assets of Godson; and I am bound to allow this exception, with costs.

WEBSTER v. WEBSTER.¹

January 28, 1853.

Separation Deed — Condonation — Plea.

Reconciliation and re-cohabitation avoid a deed of separation, but the husband may nevertheless so conduct himself afterwards as to contract a new obligation on the footing of the separation deed.

Mere payments to the wife of an annuity for life, provided by the deed, though continued after a reconciliation, and after the death of the husband, are not sufficient evidence of such a new obligation.

Form of plea of condonation sufficient without answer to a bill by the widow, on behalf of herself and all other creditors, against the assets of the husband, deceased, claiming as a creditor of his estate under the deed of separation.

THE bill in this suit was filed by Ann Webster, widow, on behalf of herself and all other the creditors of William Granville Webster, deceased, against Frederick Taylor Webster, Louisa Webster, John Fox, and Thomas Summers; and it stated, that on the 27th Septem-

¹ 17 Jur. 815.

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ber, 1843, the plaintiff intermarried with William Granville Webster, late of Preen, in the county of Salop, deceased, and that some unhappy differences having arisen between the said William Granville Webster and the plaintiff, they, in the year 1844, mutually agreed to live separate and apart from each other, and that thereupon the indenture thereafter stated was, on the 4th December, 1844, duly signed, sealed, and delivered, by all the parties thereto. This indenture was dated the 4th December, 1844, and made between William Granville Webster, of the first part, the plaintiff, Ann, his wife, of the second part, and Thomas Summers of the third part; and after reciting that some unhappy differences had lately arisen between the said William Granville Webster and Ann, his wife, and they had mutually agreed to live separate and apart from each other, and previous to such separation the said William Granville Webster had consented thereto, and also proposed and agreed that he, out of his own proper moneys, would allow and pay to the said Ann, his wife, during the term of her natural life, for her better support and maintenance, the annuity or yearly sum of 65*l.*, clear of all taxes, charges, and deductions whatsoever, payable to her in such manner as thereafter mentioned, witnessed, that the said William Granville Webster, in pursuance of the aforesaid proposal and agreement, did thereby, for himself, his heirs, executors, and administrators, and for every of them, covenant with the said Thomas Summers, his executors, administrators, and assigns, that it should and might be lawful to and for the said Ann, his wife, and that the said William Granville Webster should and would permit and suffer her, the said Ann, from time to time, and at all times from thenceforth during her natural life, to live separate and apart from him, notwithstanding her present coverture, and as if she were then sole and unmarried; and that the said William Granville Webster should not at any time or times thereafter sue her in the Ecclesiastical Court, or any other court, for living separate and apart from him, or compel her to cohabit with him, or sue, molest, disturb, or trouble her for such living separate and apart from him, or any other person or persons whomsoever for receiving, harboring, or entertaining her; nor should or would, without the consent of the said Thomas Summers, visit her, or knowingly come into any house or place where she should or might dwell, reside, or be, or send, or cause to be sent any letter or message to her; nor should or would at any time thereafter claim or demand any of the moneys, rings, jewels, plate, clothes, linen, woollen, household goods, or stock-in-trade which the said Ann then had in her custody, power, or possession, or which she should or might thereafter buy and purchase, or which should be devised or given to her, or she should otherwise acquire, and that she should and might enjoy and absolutely dispose of the same as if she were a *feme sole* and unmarried; and lastly, that the said William Granville Webster, his heirs, executors, or administrators, or one of them, should and would well and truly pay, or cause to be paid unto the said Ann, his wife, or her assigns, during the term of her natural life, for and towards her better support and maintenance, one annuity or yearly sum of 65*l.* of lawful money of Great Britain, free and

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clear of all taxes, charges, and deductions whatsoever, the said annuity or yearly sum of 65*l.* to be paid and payable to her, the said Ann, and her assigns, during her natural life, by two half-yearly payments in each and every year, on the days and times thereafter mentioned, and which said sum of 65*l.* per annum so thereby made payable to her, the said Ann Webster, in manner as aforesaid, she, the said Ann Webster, did thereby agree to take in full satisfaction for her support and maintenance, and all alimony whatsoever, during her coverture. The bill further stated, that the said separation did take place, and continued until the decease of the said William Granville Webster, and that the said indenture was acted upon in all respects by all the parties thereto until such decease.

The bill then stated, that William Granville Webster, by his will, gave all his real and personal estate, whatsoever and wheresoever, unto his brother, Frederick Taylor Webster, his heirs, executors, administrators, and assigns, subject nevertheless to the payment of his just debts, funeral expenses, and the charges of proving his said will; and the said testator, after giving certain pecuniary legacies, appointed his mother, the defendant Louisa Webster, and John Fox, joint executrix and executor of his said will; and that the said testator died on the 26th January, 1846, and that his will was duly proved by the said Louisa Webster and John Fox, and that they took possession of the real and personal estate; and that the said annuity of 65*l.* so granted to the plaintiff as aforesaid, was duly paid to her by the said testator up to the time of his decease, and that after his decease the payment of the said annuity was continued by the defendant Louisa Webster, and John Fox, and the defendant Frederick Taylor Webster, up to the 25th March, 1850; and it prayed that an account might be taken of what was due and owing to the plaintiff in respect of the said annuity of 65*l.*, and for the usual accounts and relief in a creditor's suit. The defendant, Frederick Taylor Webster, pleaded, that, subsequently to the date of the execution of the indenture in the bill mentioned, the plaintiff and her late husband, William Granville Webster, were mutually reconciled to each other, and again cohabited together as husband and wife, and therefore the defendant prayed the judgment of the court whether he should be compelled to make any further defence to the said bill of complaint.

C. Hall, for the bill, objected, that there ought to have been an answer filed, with a plea to the various statements and charges in the bill, because such discovery might have shown that the plea was untrue. Moreover, when the plea was replied to, the plaintiff's counsel should be able to read the defendant's answer. He cited Lord Redesdale's *Treatise on Pleading*, 244; and the cases of *Crow v. Tyrell*, 2 Mad. 297, and *Emerson v. Harland*, 3 Sim. 490; 8 Bligh, 85.

[STUART, V. C., referred to the facilities which the new practice gave to the plaintiff for examining the defendant in various ways, which relieved both parties from the technicalities of the old practice. The defendant might now be examined as a witness when the plea was replied to.]

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STUART, V. C. I do not think that I can sustain the objection on the point of form. The argument connects the objection, on the point of form, with matters of substance. I cannot hold that the averments in this bill are so framed as to entitle the plaintiff to an answer in support of any matter charged in the bill, as an anticipated defence, or calculated to avoid the plea. Even according to the strictness of the old form of pleading, framed for the purpose of giving to the plaintiff and defendant their full rights, I could allow this plea. In order to bring the case within the authorities cited by Mr. Hall, it would be necessary to show that the matter of discovery which he asks would aid him either in disproving the plea, or would be in some manner calculated to avoid the plea. I cannot see any averments in the bill that would justify me, according to the old practice, in holding the plea to be invalid, and deciding — what I should if I did — that the plaintiff is entitled to discovery from the defendant of any matter by his answer. Nothing is better settled than that a plea to the whole relief is a plea also to the whole discovery, unless the discovery sought is of a matter to disprove the matter pleaded, or confessing it to show something to avoid it. I find neither of those circumstances in this case, and therefore I cannot disallow the plea on the matters of form.

Malins, Q. C., and *Macqueen*, for the plea. The fact of subsequent reconciliation and re-cohabitation was a condonation which at once rendered the deed of separation absolutely void. *Westmeath v. Westmeath*, 1 Dow & C. 519; *Hindley v. The Marquis of Westmeath*, 6 B. & Cr. 200; *St. John v. St. John*, 11 Ves. 527; 3 Rep. Husb. & Wife, 372, note; *Saunders v. Rodway*, 16 Jur. 1005; s. c. 13 Eng. Rep. 463. The continued payments by the husband after the reconciliation were merely voluntary, and could not be the ground of any claim against him; they could not set up again the void deed of separation.

C. Hall, contra, argued, that as no time was stated during which the reconciliation lasted, it was a necessary conclusion that it was very short. The difference between this case and those cited was, that the deed of separation here made a provision for the wife for life, and not only during the coverture or separation; and that after the alleged reconciliation, and even after the husband's death, payments were continually made to the wife in respect of the annuity provided for her by the deed. Therefore the deed, if void at all, was only suspended during the coverture. But the better view was, that the continued payments showed plainly, that in the view and intention of the parties, the deed, notwithstanding the separation, was still valid and subsisting. *Wilson v. Mushett*, 3 B. & Ad. 752; *Gawdon v. Draper*, 2 Vent. 217; *Fletcher v. Fletcher*, 2 Cox, 99; *Jee v. Thurlow*, 2 B. & Cr. 547.

Malins, Q. C., in reply.

STUART, V. C. This is a bill filed by a widow against the legal

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personal representatives and the trustee of her husband's will, and the trustee of a deed of separation, for an account of what may be due to her in respect of an annuity under that deed, and an account of what is due to the other creditors of the husband, and for an administration of his assets upon that footing; and the plaintiff's right to the decree sought must depend on the question, whether or not, at the time of the death of the husband, she was a creditor against his estate. She avers her right as a creditor under the deed of separation. The bill states distinctly, that the separation took place and continued until the death of the husband, and that is followed in the bill by an averment that the annuity was paid up to the death of the husband, and has been paid for sometime since his death. Now, the question to be determined upon the facts of this case, upon this plea, and the bill, is one of great difficulty — whether that deed of separation, by which the husband covenanted with the trustee to pay an annuity for the maintenance of the wife during her life, and the trustee, on the other hand, covenanted, independently of the husband, against the debts which might be contracted by the wife during the separation, is a valid deed. According to the policy of the law as it is now understood, it is unquestionable, that, in the ordinary case, after the execution of a deed of separation, and after the separation, the facts averred by this plea, namely, the reconciliation and the subsequent cohabitation, would annul the deed. That I conceive to be the settled law, and not to be disturbed except by some tribunal of higher authority than this. The difficulty that occurs in this case is, that the bill avers payment of the annuity up to and since the death of the husband. Now, if there were a deed of separation, and an annuity payable under it, and a subsequent reconciliation, there would be *prima facie* an end of the deed; but upon the subsequent reconciliation, the husband might again so conduct himself as to contract a new obligation upon the footing of the former. That is a consideration which is pressed upon me in this case; but I can only deal with this plea upon the facts and circumstances alleged in the bill and as met by the plea, which suggests a reconciliation and re-cohabitation as a complete answer to the whole case made by the bill; and if it be the law, as I hope it is, that the subsequent reconciliation and re-cohabitation annul the deed of separation, I do not find any averments in this bill sufficient to induce me to hold, that, upon any subsequent acts of the husband, the consequences which would ensue from the fact of reconciliation as stated in the plea, namely, that the deed was annulled, can be avoided. The relief sought by the bill is entirely upon the footing of that deed, and the performance of the trusts thereof. The bill is not so framed as to anticipate the defence of the plea, and to seek to avoid it by stating any conduct, if there has been any, such as would amount to a re-execution of the deed, and might enable the court to deal with the assets of the husband, under the deed, exactly as if he had re-executed the deed upon a second separation. There can be no doubt that in the present case there is considerable hardship. I think, as I must take the facts, that the annuity was paid up to the death of the husband, and that the hus-

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band made his will after the date of the deed of separation, and so dealt with his wife — who continued his wife, though separated from him — until his death, as if she had a right to the annuity under this deed. It is a case of extreme hardship, where the court is called upon to administer the assets, to find that the husband made his will without any provision for the wife, but seemed to have considered her entitled to a provision by way of annuity for her life. Though I consider that the plea is a complete answer to the bill as at present framed, I shall not therefore refuse to give the plaintiff an opportunity of amending her bill, so as to make a case, if she can, more fully to show such circumstances, if any, as would induce the court to hold, that, by his subsequent conduct, the assets of the husband may be bound by the widow as a creditor; but upon the facts and circumstances, and the statements of the bill at present, I feel myself obliged to hold that the plea is a complete answer to the case made by the bill, because it goes to annul the deed under which the widow claims.

The plea was allowed, without costs; the plaintiff to amend within three weeks, or if not, to reply to the plea.

THE OFFICIAL MANAGER OF THE GRAND TRUNK OR STAFFORD AND
PETERBOROUGH UNION RAILWAY COMPANY v. BRODIE.

March 19 and 21, 1853.

*Joint-Stock Companies Winding-up Acts — Jurisdiction under, to direct
Costs to be paid Personally by the Official Manager.*

Where a suit, originally commenced by one on behalf of the other shareholders and scrip-holders of an abortive railway company, (except the defendants,) and afterwards (upon an order to wind up the affairs of the company, under the Joint-stock Companies Winding-up Acts, being obtained) ordered by the Master to be prosecuted by the official Manager, under the Winding-up Act, 11 & 12 Vict. c. 45, s. 53, was, upon the hearing, dismissed, on the ground that it had been improperly instituted, and ought not to have been adopted by the official manager, it was:—

Held that the court had jurisdiction to direct the costs to be paid personally by the official manager, and that the words of the order, "dismiss the bill, with costs, to be paid by W. T., the official manager," were sufficient to support a subpoena and attachment for costs against W. T. personally.

Quere, per Sir J. L. Knight Bruce, L. J., whether the 53d section of the statute is applicable to a suit so framed? And held, *per eundem*, that the 56th section does not apply to such a suit.

THIS was an appeal from the decision of Sir W. P. Wood, V. C., reported 17 Jur. 205; s. c. *ante*, p. 158. The facts were shortly these:— The suit was originally commenced by one on behalf of the other

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shareholders of the company, (except the defendants,) to recover from the provisional directors and secretary moneys alleged to have been abstracted from the company by the fraud of some and the negligence of others of the defendants; and it was afterwards ordered by the Master to be prosecuted by the official manager, under the Winding-up Act, 11 & 12 Vict. c. 45, s. 53. At the hearing of the cause, before Sir G. J. Turner, then Vice-Chancellor, his Honor, being satisfied that the suit had its origin in other motives than the benefit of the shareholders, and finding that it was improperly constituted, and that the bill contained charges which ought not to have been made, was of opinion that the suit ought not to have been adopted by the official manager, and he dismissed the bill, with costs, to be paid by the official manager. (See 9 Hare, 823; s. c. 13 Eng. Rep. 1.) In the order, as drawn up, the costs were directed to be paid by the official manager, without naming him personally; but as it was the intention to give the costs personally against the official manager, and as it was considered doubtful whether this intention was effected by the order, as drawn up, the order was afterwards, upon the application of the defendants, amended, by the insertion of the name of the official manager; the order, after the amendment, standing thus:—"This court doth order that the plaintiff's bill do stand dismissed out of this court, with costs, and that such costs, when taxed, be paid by the plaintiff, William Turquand, the official manager of the said company, unto the defendants," &c. Under this order the defendants proceeded by subpoena and attachment against Mr. Turquand personally; but, upon the application of Mr. Turquand, Sir W. P. Wood, V. C., made an order setting aside the subpoena, and staying all proceedings thereunder, as against Mr. Turquand in person. (See *ante*, p. 158.) Two separate motions were now made by different defendants by way of appeal from that order, asking that the order appealed from might be discharged, or, in the alternative, that the order made at the hearing of the cause might be amended by striking out therefrom the words "official manager."

J. Bailey, Q. C., and *Kenyon*, appeared in support of one of the appeal motions, and

Selwyn, in support of the other.

Daniell, Q. C., and *Little*, for Turquand, the official manager, contra.

The arguments upon the appeal were in substance the same as those urged in the court below, (see *ante*, p. 158,) and the following authorities were cited:—*In re The Oxford and Birmingham Railway Company, ex parte Croxton*, 19 Law T. 209; *Wormwell v. Hailstone*, 6 Bing. 608; *In re The Cambridge and Colchester Railway Company*, 1 Hall & T. 578; *Harrison v. Timmins*, 4 M. & W. 510; and *Hutton v. Thompson*, 3 H. L. C. 161.

March 21. KNIGHT BRUCE, L. J. The completion to-day of Mr.

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Little's very good argument not having removed the impression under which I was when I quitted the court on Saturday, I may read a note, which, in accordance with that impression, in the course of that evening I made. The original bill in this case was filed before the passing of the act of parliament which we are authorized in calling "The Joint-stock Companies Winding-up Act, 1848" — an act which has, I believe, done some good in some few instances, but the reverse in so many more, that its existence seems to be one of those curative measures, not by any means confined to a single branch of science, where the remedy is worse than the disease. After the change thus made in the law, the company, or association, or partnership on whose behalf the suit is alleged to have been instituted, became subject to the provisions of this statute; that is, its affairs were ordered to be wound up. An official manager was appointed, as the act directs, and Mr. Turquand, who became official manager, was afterwards — perhaps duly, perhaps unduly, but in fact — made plaintiff in the original suit, instead of the original plaintiff, and he subsequently filed an additional bill in the same suit, which thus comprised two bills, and which was prosecuted by him to a hearing, and was then dismissed, with costs. The question before us is, whether Mr. Turquand is personally liable to these costs — a question to which, if the answer is to depend on the language of the decree or order of dismissal, that answer, must, I think, be unfavorable to him, for the force of that decree or order appears to me to be in conformity with the intention of the learned judge who pronounced it — that is, to make Mr. Turquand personally responsible for the payment of those costs, and liable to an attachment for the non-payment of them. Certainly in that part of the decree or order he is described, not by name only, but also by the description of "official manager;" but this seems to me immaterial.

Then arises the controversy whether the learned judge had authority to make such an order — a controversy, perhaps, not, with strict propriety, belonging to this motion. I assume, however, in Mr. Turquand's favor, that it does so. Mr. Turquand says that these portions of the act of 1848, lying between the 49th and 61st sections, exempt him personally; and there is, I agree, enough to admit of an argument.

The statute is not one of those, so very rare in modern times, which are free from obscurity on points of importance. He relies mainly on the 53d, 56th, and 59th sections. I doubt, however, very much whether the 53d section extends to cases of the present description, in which one shareholder of an inchoate or unformed company sues on behalf of himself and other shareholders, described as plaintiffs in the suit. The description in the bill is as follows: — "John Warren, on behalf of himself and all others the shareholders or scripholders of the company or undertaking of the Grand Trunk &c., Company, except the defendants." I doubt, I say, whether the 53d section extends to a case of that description, some or all of the defendants being shareholders; but the 56th section, I think, does not so extend, even if I could possibly assume a state of circumstances in which the 56th sec-

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tion could be applied, where the official manager is originally, or becomes by substitution, plaintiff in the suit. The 57th section of the statute relates only to actions, and it seems to me that the prior, or disabling, or prohibitive part of the 59th section cannot reasonably be held applicable to a case not coming under either the 56th or the 57th section. I think that, unless perhaps in the latter portion of the 59th section, that portion of it which speaks of reimbursement or indemnity to the official manager, the 59th section does not touch the present suit. I differ, therefore, though with the greatest and most unfeigned respect, from the learned and able judge before whom this case last came, and should, if I had sat for him, have refused the application of Mr. Turquand, upon whom personally there is no ground of imputation of any kind, with costs. It is competent to him to ask from the Master a direction for indemnity; and perhaps the Master may comply with the request, which I have not intended by what I have said to affect — a remark which I may also make as to the right (if any) of the defendants before the court to apply to the Master for aid as to the costs in dispute — a point, however, which seems to me to be immaterial, as there is no question as to Mr. Turquand's solvency. Before parting with this matter, I will only add that the 60th section seems to me almost, if not altogether, to render necessary the conclusion at which I have arrived; but I have laid no stress upon it.

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TURNER, L. J. I desire to repeat what I said during the argument, that I never intended to cast any imputation upon the personal conduct of Mr. Turquand. That this suit has been improperly instituted I entertain no doubt; that it has been improperly conducted even since Mr. Turquand has been plaintiff, I entertain no doubt, because, upon the evidence which is given in this case, I think that it discloses a spirit very inconsistent with the just prosecution of the rights of the original plaintiff or of Mr. Turquand. I desire to say that I do not attribute the nature of this evidence to Mr. Turquand, though I do attribute blame to the parties for having given such evidence. Now, the questions are these: — First, it is said that the court has no jurisdiction to make the official manager pay costs. I take it that every court must have jurisdiction over the proceedings which take place in that court; and therefore, when it is said that the party is not to be held liable to costs, I take it that it must be shown that the naked words exclude the right to recover costs against that party, or that the court has no power to give them. At the time I gave my decision, I looked carefully into the act, and, having reconsidered it, I entertain no doubt whatever that there are not to be found in this act any words which exclude the power of the court to visit the plaintiff in person with costs, although he be an official manager, if the court be of opinion that they ought to be paid by him. Then the question is, whether this decree has been properly drawn up for the purpose of fixing Mr. Turquand personally with the costs which, in my opinion, ought properly to be fixed on him. I think it has, and for this reason — where a party is by name ordered to do an act, it necessarily be-

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comes his duty to do that act. Now, here Mr. Turquand is ordered by name to pay these costs. It is true that he is described in the order as official manager; but that is simply a *descriptio personæ*, just as in the bill he describes himself as "W. Turquand, official manager." It seems, therefore, that upon these grounds, the decree, as drawn up, does give the costs as against the official manager personally, and that the order of the court below should be discharged. Suppose, in the case of a bill filed by an executor to recover a debt alleged by him to be due to the estate of his testator, the bill to be dismissed, with costs, and the order to be drawn up thus, "It is ordered that the bill be dismissed, with costs, to be paid by A. B., executor of" &c., would that make any difference, or would it make it incumbent on the defendant to look for payment of his costs to the testator's estate, and not to the executor personally? I have already said it is not my intention that the judgment I gave should at all prejudice the question whether these costs ought to be paid out of the assets. They must, in the first place, be paid by Mr. Turquand, the official manager, personally; and the order of the court below must be discharged.

An order was then made discharging the order of the court below, and refusing the motion there, with costs.

PATERSON v. MURPHY.¹

February 25, 1852.

Declaration of Trust.

P., being indebted to J. in a sum of 300*l.*, to be repaid by instalments, drew up, but did not sign, a memorandum, which was signed by J., by which J. directed the instalments to be invested as therein mentioned, and the dividends to be paid, after the decease of J., to and among the children of P. M. and E. his wife; and when the youngest attained the age of twenty-one years, then the whole fund was to be divided among such children. If any child died before the youngest attained twenty-one years, his share was to go to the survivors in the same manner. This memorandum was never made known to the parties interested, but only to P. and J. Afterwards J. executed another memorandum, in effect revoking the direction in the first memorandum for investing the instalments, and directing payment of the instalments to herself:—

Held, that the first instrument amounted to a full and complete declaration of trust, and was, therefore, not revocable.

P., the trustee, had paid several instalments to the testatrix after the date of the second memorandum:—

Held, that the *cestuis que trust* under the first memorandum could not recover these payments in the present suit, which was a suit by P., the executor, for the administration of the estate of J.

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THE plaintiff, Paterson, in this case, was the trustee of a sum of money, the right to which was disputed under the following circumstances:—the testatrix had advanced 800*l.* to the plaintiff, in order to enable him to build some houses. As a security, he deposited with her the title deeds of the land on which the houses were built, with a memorandum, which was to the following effect, namely, that the plaintiff was to pay the testatrix 10*l.* a quarter, from Christmas, 1847, until the sum of 70*l.* should be paid; that he was then to invest 10*l.* a quarter in consols until 200*l.* was invested; and after her decease, he was to pay this sum of consols, together with the interest and dividends, to the children of J. P. Murphy and Eleanor Murphy, in equal shares, when the youngest attained twenty-one; but if any child should die before the youngest should attain twenty-one, then the share of the one so dying was to be divided among the children of Eleanor Murphy, as and when they attained twenty-one years. This memorandum was in the handwriting of Paterson, but not signed by him; but it was signed by the testatrix. Afterwards another memorandum was drawn up, also in the handwriting of the plaintiff, and signed by the testatrix, in the following words:—“I wish you not to make the investment in consols, nor to pay the same to the children of Eleanor Murphy, but to continue the payments to me.” The plaintiff thereupon continued to make the payments to the testatrix, on the footing of the latter memorandum. After the decease of the testatrix, the children of Eleanor Murphy set up their claim to all the sum of 200*l.* and interest, alleging that the first memorandum amounted to a complete declaration of trust, which the testatrix had no power to revoke by the latter memorandum; that Paterson had full notice, since the instrument was in his handwriting; and that notice to the *cestuis que trust* was not necessary, they being, moreover, infants.

Terrell, for the infants, cited *M'Fadden v. Jenkins*, 1 Ph. 157; s. c. 6 Jur. 501; *Kekewich v. Manning*, 16 Jur. 625; s. c. 12 Eng. Rep. 120; and *Moore v. Darton*, 20 Law J. Rep. (n. s.) Chanc. 626; s. c. 7 Eng. Rep. 134; which latter was almost exactly the present case, to show that the trust need not be communicated to the *cestuis que trust*. *Bill v. Cureton*, 2 My. & K. 503, showed such a settlement to be irrevocable. *Garrard v. Lauderdale*, 2 Russ. & M. 451; *Walhoyn v. Coulls*, 3 Mer. 707; and that class of cases, are distinguishable, as being for the settlor's own benefit. He also referred to *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Dillon v. Coplin*, 4 My. & C. 647; Vice-Chancellor (then Mr.) Wigram's argument, which was of great force in the present case; *Exton v. Scott*, 6 Sim. 31; and *Fletcher v. Fletcher*, 4 Hare, 67; and contended that a good and final declaration of trust was created by the first memorandum, which could not be affected by the second memorandum.

Cracknall, for Paterson, the trustee, abstained from taking any part in the argument.

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T. Smythe, for the next of kin. In all the cases which have been cited on the other side, except *Moore v. Darton*, the matter did not remain on a mere agreement, but was in a regular form, and by deed duly delivered. In *Moore v. Darton* there were several circumstances of distinction.

Wood, V. C., (without hearing a reply). It seems to me that a complete declaration of trust has been made of this fund. Every necessary ingredient for a perfect declaration seems to be here. There is an existing fund — it is a debt, it is true, but that is quite immaterial — and the instrument creating the trust is in the handwriting of Paterson himself, so that he had full notice of the trust, though the document is not signed by him; it is, however, signed by the lady, the settlor. That document directs what is to be done with the fund; after the decease of the testatrix, it is to be given beneficially among certain children when the youngest attains twenty-one, and if none attain twenty-one, then over. I was about to consider whether this could be considered as a declaration of trust, or whether it ought not rather to be viewed as creating an agency, directing a distribution for the benefit of the party herself; merely, therefore, to be considered as containing the terms of an arrangement in which the testatrix herself alone was beneficially interested. There are many cases where a debtor appointing property, the ultimate trust of which is for himself, that appointment has been held merely voluntary, and revocable by the settlor. But I do not know any case, in which that view has been taken, where there is no obligation on the party making the arrangement, as for creditors or the like. In the case of a voluntary declaration, the obvious inference is, that it was made by the settlor for the benefit of the parties to whom he now, for the first time, places his property under this liability. As to an arrangement of this sort for payment of creditors, it stands on quite a different footing. The settlor has certain debts, and he thinks the best way of paying these debts is to convey his property to trustees to satisfy the creditors, and hand over the balance to himself. Such an arrangement is one merely for the benefit of the settlor himself, and the trustee is in fact to be considered merely as his agent. But I am not aware of any case in which a declaration for the benefit of pure volunteers has been held to be a case of mere agency.

Moore v. Darton, seems to be very nearly the present case. There are some distinctions between that case and the present. There the document was signed by the trustee, and was actually handed over to the person benefited, by the testatrix in her lifetime; so that, in fact, the question of a *donatio mortis causa* was ready to be raised if the Vice-Chancellor had not held that it was precluded by the fact that the circumstances constituted a complete declaration of trust. But in this case the body of the document was in the handwriting of Paterson; and there is no case which makes it in any way necessary that the *cestuis que trust* should be made acquainted with the existence of the trust to make it completely binding. In *Kekewich v. Manning*, and other cases of that description, the only question was,

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whether the document was to operate as an assignment or a declaration of trust. In *Hughes v. Stubbs*, 1 Hare, 476, there was a very simple distinction from the present case. This is not the result merely of a verbal conversation, which might leave some doubt in the mind of the court whether a trust were really created, because so much might depend upon a single word of the testatrix. Any little expression thrown in, such as "it is my present intention," would show that she had no intention absolutely to give the property. But in that case the lady gave an order to Cropper for 150*l.*, and at the same time gave verbal directions to apply the money to make up the difference in value of the 100*l.* legacy given in the will, and the value of a share of 100*l.* stock in the London and Birmingham Railway Company at the time when such legacy should be payable. Therefore the real meaning of the testatrix was, as the Vice-Chancellor held, that that was to be taken, and was intended, for a testamentary appropriation, not as a present declaration of trust; and that the testatrix wished to retain the same power over that as over what she had given by her will. But, in the present case, what can it be but a declaration of trust? and there is no power of revocation reserved in the document. The document is, therefore, irrevocable, and I must declare the children entitled. The petitioner cannot, however, have more upon this suit than the amount, 160*l.*; he cannot have, as against Mr. Paterson, the payments which he made to the testatrix herself after the date of the second document.¹

COWMAN v. HARRISON.²

December 7, 8, and 16, 1852.

Precatory Trust.

Gift by will to trustees to sell and invest, and pay the annual income to the testator's widow, during widowhood, "for the maintenance, education, and support of herself and her children;" with the following words—"and I do particularly recommend, desire, and direct my said wife, at her decease, by will or otherwise, to divide and dispose of what money or property she may have saved from the said yearly income among all my children, in equal shares."—

Held, too indefinite as to the subject-matter to constitute a trust for the children in any savings made by the widow.

JOHN BARWISE, by his will, gave and devised to his wife, Joanna, during her life, if she should so long continue his widow, the use

¹ The latter observations were addressed to the state of circumstances in which the present contention arose. The suit was for the administration of the assets of the testatrix. In that suit a claim was made by the next of kin against the trustee for the residue of his debt; and the Vice-Chancellor directed the suit to stand over, in order that a petition might be presented by the *cestuis que trust* claiming under the memorandum above mentioned.

² 17 Jur. 818.

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and enjoyment of all his household goods, &c.; and after her decease, or second marriage, he gave the same among his children, in such shares, &c., as she should think proper to will or order the same. The testator then gave all the rest and residue of his real and personal estates, consisting of lands and houses, and of a pottery and share in a ship-building yard, and other particulars, to trustees, upon trust for sale, and to invest the proceeds, and suffer his wife to reside in the testator's house at Granby, and to pay the interest of the said trust moneys, and the yearly rents and dividends of the estate while it existed, in specie, "to my said wife during her life, if she should so long continue my widow and unmarried, for the maintenance, education, and support of herself and my children, subject, nevertheless, to the proviso hereinafter mentioned;" and then the will, after several other directions, contained a proviso in the following words, namely, "And I do particularly recommend, desire, and direct my said wife, at her decease, by will or otherwise, to divide and dispose of what money or property she may have saved from the yearly income hereinbefore given to her, amongst all my children, in equal shares." The bill was filed by John Cowman and his wife against several persons, on various grounds of complaint. The plaintiff, Jane Cowman, was the executrix and legatee of John Barwise the younger, and daughter of John Barwise the elder, with whose will all the claims brought forward by the bill were connected, but were of no general interest, except the question as to the savings by the widow.

December 7 and 8. *Rolt and Riddell*, for the plaintiffs.

Bethell and Osborne, for the defendants. [They cited *Malim v. Keighley*, 2 Ves. jun. 333, 529, 531, in which *Cunliffe v. Cunliffe*, Amb. 686, is overruled as to such an expression; and *Gwynne v. Hawkins*, 1 Bro. C. C. 99.] In order to constitute a trust, there must be certainty of subject as well as certainty of object. Here the alleged subject of the trust—the savings, if there should be any, of the life-interest,—were entirely at the mercy of the tenant for life; no trust, therefore, could be created. The subject must be in existence at the time the trust concerning it is created. In *Pushman v. Filliter*, 3 Ves. 7, if the mother could spend the subject-matter it was held there would be no trust. *Knight v. Knight*.

[TURNER, V. C. I wish you would leave other cases, and turn your attention to the case of *Surman v. Surman*, 5 Mad. 123.]

That case was an absolute gift made by the testator to his wife, and a gift after her decease, of so much as should be left, to other parties. That was, therefore, a gift to the wife for life, with the power of taking the whole. It was the case of a tenant for life, with a power not exercised, an authority not resorted to; in which case, of course, the gift over took effect. Besides, the will does not seem to relate to real property, but the judgment seems to go on the fact of the property being realty. Contrast this case with *Horwood v. Webb*, 1 Sim. & S. 327, before the same judge, and *Woods v. Woods*, 1 My. & C. 401. The estate of John Barwise, the son, cannot be administered in this suit.

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Jervis and *W. W. Cooper*, for the different trustees.

Rolt, in reply, cited *Raikes v. Ward*, 1 Hare, 445, and *Lorymore v. Elcum*, 2 Y. & C. C. C. 370.

December 16. TURNER, L. J., (after stating the circumstances.) Several claims were advanced by the plaintiff. First, she claimed some interest in the savings made by her mother, Joanna, from the income of the property given to her by the will of her husband, John Barwise the elder. She also claimed an interest in certain legacies given to Joanna, and in the pottery, and in respect of a share in the furniture originally belonging to John Barwise the elder, which was given to Joanna, his wife, for life, with remainder to his children, in such shares as she should appoint. [There were also other claims, the decision of which involved no point of general interest.] It appears by the correspondence that it has been agreed that no objection shall be taken on the ground of multifariousness; and I do not feel inclined to create any difficulty on that ground, though I have no doubt that the suit is obvious to the objection. The most material question is upon the right to the savings of the income of Joanna, under the will of John Barwise. [His Honor read narrative statements in the will as to the furniture, and other specific portions of the property, and the trust to convert and pay debts.] The residue is given upon further trust, subject to the payment of two sums of 500*l.* and 700*l.* That is all which has any thing to do with the present question, except the subsequent clause, (which his Honor read, being the recommendation as to savings.) There were two views put forward as to the ulterior bequest of the savings. The plaintiff argued that it was a gift of the income to the widow for her life, with a gift to the children of so much as she should not spend. On the other side, the defendants contend that this is a gift imposed upon another, to whom the beneficial interest is given. Now, what are "savings?" The amount depends entirely upon the will and pleasure of the widow. This ulterior bequest could not be intended to act as an inducement to spend the whole of her income. The gift is his, but whether there shall ever be any thing upon which it can ever take effect, depends upon her pleasure. So far as regards the subject-matter of the bequest, therefore, this cannot be higher than a precatory gift.

Then what are the terms of the bequest? It is placed at her disposal by will or otherwise. It is by the distribution of the wife that the children are to take — by her distribution made at his desire, but by distribution made by her — not by any gift in the testator's will to the children. This, therefore, is not the case of a gift to A, with a gift over of the subject to B, but it falls within the class of cases where there is a gift to A, with a request that he will bequeath it to B. The question is, whether this can be good as a precatory gift. The rule is, there must be a certainty of the subject, and the foundation of the rule stands on very solid ground. Where there is a right in the donee to spend the subject of the gift, that is inconsistent with the nature of such a precatory trust to bequeath it over to any other per-

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son; and therefore the court collects, from the fact of a power to the donee to dispose of any portion of the fund, that the donee is to be at liberty to disregard the ulterior intentions of the testator as to that. If a trust were raised, it could not be enforced; therefore the court says it shall not be raised at all. I think the case falls completely within that class of cases where the testator makes a gift of so much as shall be left at the decease of a person to whom he has given the use of any thing.

But then it was attempted to take the case out of the authorities by reference to the previous gift as to maintenance. It cannot, however, be argued, that under this she takes no beneficial interest. She was bound, no doubt, to maintain the children for some indefinite period; but, subject to that, she took a beneficial interest in that portion of the income out of which the savings were to come. What she is to take she takes beneficially. Two cases were referred to by the plaintiff — one was *Briggs v. Penny*, 3 Mac. & G. 546; s. c. 8 Eng. Rep. 231. There the subject was certain; the only doubt was as to vagueness in description of the object. Lord Truro held, that that vagueness was immaterial if it was certain that there was a trust created. The other case was *Eade v. Eade*, 5 Mad. 118. There there was certainty of the object, but uncertainty of the subject; and that was held to be a good gift of the residue. But I do not think that either of those cases affects the present case; and I think the present bill must be dismissed, and, under the circumstances, dismissed with costs. The general rule is a wholesome one, that a party coming here with an adverse claim, and failing, must pay the costs. The case has been improperly conducted, nor do I think that the claim has been made *bond fide* for administration of the estate of the testator, but for the separate and individual interest of the plaintiff. It is an attempt to enforce a compromise, on terms more favorable to the plaintiff, by a threat of a suit — an attempt which, however frequent, (and I am afraid it is too frequent,) must always meet the condemnation of this court whenever it appears.

In re 10 & 11 VICT. c. 96, and *in re* EDWARD DAVENPORT'S TRUSTS.¹

December 22, 1852.

Will — Construction — "Wife and Children" means lawful Wife and Children, primâ facie.

Bequest of stock, after the death of the testator's widow, upon trust to pay the dividends to G. for life, and then to his wife for life, and after the decease of the survivor, to divide the

¹ 17 Jur. 814.

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capital among the children of G. G. had, from a time previous to the date of the will, up to the death of the testator, been living with a woman who was believed to be his wife, and by whom he had several children. G. was never married; he died after the death of the testator, in the lifetime of the testator's widow:—

Held, that the description in the will applied to a lawful wife and children whom G. might have had after the date of the will, and to no others.

EDWARD DAVENPORT, by his will, dated the 26th October, 1843, after various legacies and bequests, gave, devised, and bequeathed all his real and personal estate and effects to his wife, Mary Davenport, his nephew Edward Davenport Bryan, and William Powell, their heirs, executors, administrators, and assigns, upon trust to invest, and to stand possessed thereof upon trust to pay the dividends, interest, rents, profits, and annual produce thereof respectively to his said wife during her life, for her separate use; and as soon after the decease of his said wife as should be convenient, to pay the several legacies thereinafter given; and the said testator directed that his surviving executors should set apart and stand possessed of the sum of 1,000*l.*, 3*l.* per cent. reduced annuities, upon trust to pay the interest and dividends thereof to his nephew, George Charles Davenport, for his life; and from and immediately after his decease, in case his (the said George Charles Davenport's) wife should survive him, to pay the said interest and dividends to her, for her life, for her own sole, separate, and exclusive use and benefit; and from and after the decease of the survivor of them, upon trust to pay, transfer, and divide the said 1,000*l.* annuities unto, between, and amongst all and every such one or more of the children of his said nephew, George Charles Davenport, as should be then living, in equal shares and proportions, as tenants in common, if more than one, and if but one, then the whole to such only child; and as to all the rest, residue, and remainder of his real and personal estate and effects, the said testator gave, devised, and bequeathed the same respectively (subject to the life-interest of his said wife) unto, between, and amongst Edward Davenport Bryan, Frederick Thomas Bryan, and Eloisa Barston, their heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, in addition to the respective devises and bequests in the said testator's will before contained in their favor.

On the 30th January, 1844, the testator died. His widow, Mary Davenport, died on the 15th June, 1852, and the said George Charles Davenport died in the month of May, 1845, in the lifetime of the said testator's widow, without ever having been married, leaving him surviving a woman with whom he had cohabited from 1836 until his death, and who passed for his wife. On the 30th November, 1852, Edward Davenport Bryan and William Powell, upon an affidavit of these facts, transferred the said sum of 1,000*l.*, 3*l.* per cent. reduced annuities, into the name of the Accountant-General, in trust in this matter, to an account entitled "The Account of the Legacy bequeathed in Trust for George Charles Davenport, his Wife and Children." The present petition was by the residuary legatees, for payment of the fund to them. There was evidence by affidavit that George Charles Davenport had introduced the lady in question to his friends as his

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wife, and that they believed her to be, and that she was generally reputed to be married to him; but that, in fact, George Charles Davenport never was married, but had induced this lady to live with him as his wife; and her affidavit proved that she had five children by him, all of whom were treated by him as his children, and bore his name, and were by such names entered by him in his family Bible.

It was also in evidence that these children were generally reputed to be his legitimate children, and that four of them were born before the date of the will, two of whom died in 1845, after the death of the testator, and the fifth was born in 1845, and was still living.

Malins, Q. C., and *Springall Thompson*, for the petition. It is most probable that the testator intended to benefit this lady and her children, but there is no sufficient expression of this intention.¹ The designation in the will does not apply to her or her children. It can only be understood to refer to a lawful wife and legitimate children, which he might have had after the date of the will. Then the representation that she was married was a fraud on the testator, and the inducement to the gift being an erroneous supposition, it will be void. *Kennell v. Abbot*, 4 Ves. 802.

Beavan, for the surviving executors of the will.

Prendegast, for other parties.

Chandless, for the lady. On the face of the will this is a gift to persons then in existence, and the evidence of reputation is ample.

STUART, V. C., (preventing the reply,) said that, to support the argument for the lady and her children, it must be shown that she and her children would have taken the legacy against a lawful wife and children of George Charles Davenport, supposing him to have married afterwards. His Honor said that it was a very hard case, but that he could not alter the words of the will, and therefore could not hold the lady to be so described as to be entitled to the legacy. If the testator had named her, the case would have been different. The prayer of the petition must be granted.

¹ See *Harris v. Lloyd*, Turn. & R. 310.

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EDDLESTON v. COLLINS.¹

December 17, 18, and 27, 1852.

Copyholds — Surrender to an Infant Deputy Steward — Equity of Redemption — Pleading — Married Woman.

A surrender taken out of court of copyhold lands of a married woman, and requiring, therefore, her separate examination and consent, may be well taken by a deputy steward who is an infant. (*Dubitante* Sir J. L. Knight Bruce, L. J.)

Observations on the rule, that in a mortgage of a married woman's estate, the old uses, subject to the mortgage, will not be considered to be changed by the mere circumstance that the equity of redemption is reserved differently. Per Sir G. J. Turner, L. J.

Semble, a defendant cannot obtain relief against the plaintiff by impeaching his title by answer; that must be done by cross bill; and the ordinary course of the court is, not to stop the progress of the cause, unless the cross bill is filed in due time. Per Sir G. J. Turner, L. J.

THIS was an appeal from the decision of Sir G. J. Turner, late Vice-Chancellor. A full report of the case will be found in 16 Jur. 790, s. c. 13 Eng. Rep. 331. The short question was, whether a surrender of copyholds by a married woman, taken out of court by an infant deputy steward, who examined her apart from her husband, was a valid surrender. The Vice-Chancellor having decided that it was, the defendants appealed from that decision. The deputy steward was at the date of the surrender within two months of being twenty-one years of age; and there was no doubt that, but for the objection of infancy, he was competent to examine the lady as to her acting of her free will in the matter of the surrender; although in the course of the argument an objection was raised to his acting as such deputy, on the ground that he was the articulated clerk of Adcock, the mortgagee.

Elmsley and *Smythe*, for the plaintiff, relied on the following authorities and text-books upon this point: — *Scambler v. Waters*, Cro. Eliz. 637; *Younge v. Fowler*, March, 38-42; s. c. Cro. Car. 556; *Crosby v. Hurley*, Alc. & Nap. 431; Bac. Ab., tit. "Infant," E., citing Plowd. 379, 381; Co. Copyh. s. 45; *Younge v. Stoell*, Cro. Car. 279; and Co. Litt. 3, b., note 4; Id. 78, b.; and contended that there were but two matters in which the fact of a party being under the age of twenty-one years was a legal objection to the act, namely, in cases of judicial appointments, or in conveying away his own real property; that the only other case in the books was, where an infant was said not to be competent to hold the spurs of the King at the coronation. Co. Litt. 107, b.

Glasse and *Beale*, in support of the appeal, cited Com. Dig., tit.

¹ 17 Jur. 831; 22 Law J. Rep. (N. S.) Chanc. 480. Before the Lord Chancellor (Lord CRANWORTH) and the Lords Justices.

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"Officer," D. 2, and tit. "Infant," C. 1; Co. Com. 2 Inst. 514; Co. Copyh. s. 46; 1 Inst. 3 b., note 4, by Hargrave; 9 Vin. Ab., tit. "Infant," T.; Gilb. Ten. 320, 4th ed., by Watkins; Seton of Decrees, 257; *Tasburgh's case*, 1 V. & B. 507; 2 Turn. & Ven. Ch. Prac. 85; *Rex v. The Churchwardens of Kingsclear*, 2 Lev. 18; *Eyle's case*, 1 Vent. 153; *Howard v. Wood*, 2 Show. 24; Scriv. Copyh. 134, 145, 3d ed., 111, 114, 4th ed.; *Hearle v. Greenbank*, 1 Ves. sen. 303; *Parker v. Kett*, 1 Salk. 95; and Co. Litt. 117, b., 118, a. On the other question alluded to by Sir G. J. Turner, L. J., in his judgment, namely, as to the equity of redemption not being reserved to the wife, and the effect of that, they cited *Ruscombe v. Hare*, 6 Dow. 1; s. c. 2 Bligh, (N. S.) 192; *Innis v. Jackson*, 16 Ves. 356; and on appeal, 1 Bligh, 104; *Plowden v. Hyde*, 16 Jur. 823, s. c. 13 Eng. Rep. 174; and *Clark v. Burgh*, 2 Col. 221; but as the form of the deed did not properly raise the question, and the decision turned entirely upon the question of infancy, it is not considered necessary to set out the particular terms of the deed.

Elmsley, in reply, referred to *Zouch v. Parsons*, 3 Burr. 1794, 1800.

LORD CHANCELLOR, (Lord Cranworth). In order to support the proposition which has been contended for, several old authorities were referred to. They received additional weight from the fact, that those who followed Lord Coke saw no reason to doubt their validity. Lord Coke, in his 46th section of his Treatise on Copyholds, says, "If an office of stewardship descend unto an infant, he may make a deputy, because the law presumeth he is himself incapable to execute it." Then there are other passages, which go to this effect, "that an infant cannot be a steward." Now, what is the meaning of those words, "cannot be a steward?" In *Scambler v. Waters*, Cro. Eliz. 637, the decision is unintelligible, as collected from the report, but it means no more than that an infant cannot maintain an assize or real action for that office, as an office. Whatever be its meaning, supposing it to be stated distinctly that he cannot be a steward or a deputy steward, it must be read with the qualification that Lord Coke states at length, and which is adopted in all subsequent writers, in these words — "The law is not very curious in examining the imperfection of the steward's person, nor the unlawfulness of his authority; for be he an infant or *non compos mentis*, an idiot or lunatic, an outlaw or an excommunicate, yet what things soever he performeth as incident to his place can never be avoided for any such disability, because he performeth them as a judge, or at least as custom's instrument; and for his authority, though it prove but counterfeit if it come to exact trial, yet if in appearance or outward show it seemeth current, that is sufficient."

An argument was adduced at the bar, that a steward, though an infant, might be, perhaps, allowed to do ministerial acts, but that the separate examination of a married woman was an act requiring discretion, and to which Lord Coke could not have intended it to apply. I think Lord Coke meant absolutely to include every act of the ste-

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ward — he makes no distinction whatever; and there is scarcely any act a steward does that does not require some discretion; and in the case of most surrenders, there is always one important act that requires very great discretion, which is the assessment of the fines: that is to be done actually by the lord, but really by the steward. Another case of discretion which continually occurs is, that suppose one claims as heir, and another as devisee, it is common to admit them both, and let them litigate together. It is competent for the steward to say, "That is a false will — a forgery; I will not admit you." It has been thought it was for him to do that at his peril. I do not think the distinction can be sustained. Having that distinct authority of Lord Coke, an authority so much in conformity with the convenience of mankind, that even if there were doubts cast upon it, which I do not find, I should be very reluctant to listen to any such suggestion, because the danger to titles would be enormous if it could be said that a transaction, as to which parties have no means of inquiring except by looking at the court rolls, is absolutely void by reason of infancy or idiocy, or *non compos mentis* or lunacy, or outlawry or excommunication, attaching to some person, as to which there is no evidence that any such disability did attach — finding that authority distinctly stated in that elaborate way by Lord Coke, I have no difficulty in coming to the conclusion, that that, as a legal objection, cannot be sustained.

Then, if that be so, what is the effect of the surrender? The defendants say, that even supposing that the difficulty as to the steward be got over, still it ought to operate only as a surrender to secure the sum of 100*l.*, which was all that was then advanced. What is its legal meaning? It is a very complicated and a very artificial mode of effecting the object which it attempted to effect. I give no opinion whether the lord was bound to accept such a surrender. Probably he might not be. That question was discussed in the case of *Glass v. Richardson*, 9 Hare, 698; .s. c. 15 Eng. Rep. 198; in which there were some authorities quoted of a recent date in the Court of Queen's Bench. Very likely the law might be, that the lord would not be bound to accept such a surrender; but having done so, I confess it appears to me, that the surrender operated, as the language imports, "to such uses as Adcock, by the direction of Collins, should from time to time appoint."

If, therefore, Adcock did afterwards appoint, with the consent of Collins, that that surrender should enure to particular uses, it would so enure. But, then, supposing there could be no objection by reason of the infancy of the plaintiff, and that the power given by the surrender had been from time to time properly executed, still it had only been properly executed in form; for, in truth, Mrs. Collins says, "I was imposed upon. I did not know what I was executing; this surrender was never explained to me. I never meant to do more than to authorize the raising of the additional 100*l.* beyond the first 50*l.*, which was, *ex concessis*, a good advance." If that were so, though, perhaps, the more strict course would have been to file a cross bill to set aside the transaction, yet I conceive it may be raised

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by way of defence, by saying for what sum the plaintiff is to be considered as a mortgagee; and in that view it is that, upon the evidence, it must be inferred Mrs. Collins knew nothing of all those subsequent transactions; that, in truth, she thought only that she had surrendered in 1846, to secure the 100*l.* then advanced to her husband, as she had surrendered in 1844 to secure the 50*l.* advanced, and that all the rest was a mere fraud; that, in truth, the deed was framed in fraud of her, and so as to rob her of her estate. Now, for that purpose, one must look at what the evidence in the cause is. [His lordship here went through the evidence, and said it was strongly corroborative of the fact, that every thing which had been done was done with the entire privity of that lady, and that every thing was explained to her; for that, upon a contrary assumption, her conduct, as appearing upon the evidence, was irreconcilable with the conduct of a rational person.] On this point, therefore, the defendants have failed. There is nothing on which I can find any thing leading to a fraud. The plaintiff is entitled to be treated as a mortgagee for 600*l.* and interest; and the decrees below was perfectly correct.

TURNER, L. J. At the request of my learned brother I have next to state my opinion upon this case. Having already, in the court below, (16 Jur. 791; s. c. 13 Eng. Rep. 334,) fully entered into the question of the capacity of an infant deputy steward, of competent understanding, to take the surrender of a copyhold estate, and determined that he was capable of doing so, it is unnecessary for me to say more upon that point than that that opinion has not been altered by any thing which I have heard on the reargument, or by the further consideration which I have given to the question. In the course of the argument upon the appeal, however, two or three points have been brought forward which were not adverted to in the court below, and I think it right to make a few observations upon them.

It has been argued on the part of the appellants, that this case falls within the principle of the cases in which it has been held, that, upon mortgages of the estates of married women, the old uses were not altered by the equity of redemption being reserved to parties who would not be entitled under those uses. Those cases do not appear to me to apply to the present, or in any degree to assist the appellant's case. They proceed upon this principle — that the purpose of the deed being to create a mortgage, the court will not, from mere trifling and partial alterations in the reservation of the equity of redemption, imply an intention, not merely to create the mortgage but also to alter the uses. The court is to collect what was the intention of the parties in the transaction. The nature of the transaction distinctly evidences one intention, and the court will not, from trifling circumstances, impute another; but in the present case it distinctly appears, by the surrender, that the intention was not merely to create a present mortgage, but to give power to create further charges; and nothing which I can find in the cases referred to would warrant the extension of them to such a case.

The case of *Jackson v. Innes*, in the House of Lords, seems to be

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very strongly opposed to this argument on the part of the appellants. The question here is on the right to create the further charges, and not on the right to the ultimate equity of redemption, subject to the charges when created. The appellants then attempted to impeach the securities upon the evidence taken in the cause; but the appellants are defendants in this cause, and I feel great doubt whether it is competent to them to do so. The plaintiff's security is, I must now assume, well created by deed, and I rather apprehend such a security, if impeached at all, must be impeached by cross bill. The security is good until impeached; and to allow the defendant to impeach it by her answer, and by evidence on her part, would be to make a decree in favor of the defendant upon the application of the plaintiff. If the defendant were at liberty thus to impeach the plaintiff's title, she must equally be at liberty wholly to subvert it; and the consequence of allowing this would be, that plaintiffs coming to this court for relief might find themselves in a position of being decreed to convey to the defendants.

The objection to decreeing relief upon the answers to defendants is, perhaps, founded upon deeper reasons than may at first sight appear. It may be the medium of compelling defendants to do justice to plaintiffs, by putting any legal rights they may have under the control of the court, and of thus giving effect to the rule, that he who comes into equity must do equity. The only other point to which I think it necessary to advert, is the offer now made on the part of the appellants to file a cross bill, the court in the mean time suspending the decree. It is, I apprehend, within the power of the court to grant this indulgence; but what is asked of the court is clearly indulgence. The ordinary course of the court is, not to stop the progress of the cause unless the cross bill is filed in due time. Upon a motion to adjourn a cause, upon the ground of a cross bill having been filed, in *Coates v. Pearson*, 4 Mad. 262, Sir John Leach says, "If the cross bill had been filed in due time, you might have moved to have staid publication in the original cause until an answer was put in, but you cannot now stop the progress of the cause."

Has, then, the appellant made a case entitling her to the extraordinary indulgence of suspending the decree in the original cause, not at the original hearing, but at the rehearing? I am of opinion that she has not. I think it clear upon the evidence, that this lady well knew that her late husband was borrowing money on the estate, and was herself instrumental to the borrowing it. This, I think, is fully proved by the plaintiff's evidence, and the lady does not in her evidence assert the contrary. I think the case set up by this lady, of fraud upon her in procuring the surrender, is entirely an after thought upon her part. The evidence seems to me to prove that the original dispute in this case was, whether more than 450*l.* was due on the securities, not whether there had been any fraud in the surrender; and that at the later period of the dispute the question raised by this lady's solicitor on her part was, not whether there had been fraud in the surrender, but whether the lady could not defeat it upon the legal ground of the infancy of the deputy steward. These are circum-

Ex parte Sewell; In re Shaw.

stances which might not defeat the right of the appellants to relief in equity, but in my opinion they are circumstances which disentitle them to any extraordinary indulgence from the court; and I therefore concur in the opinion that this appeal ought to be dismissed.

Knight Bruce, L. J. In the present case there are questions of law, of equity, and of fact, which, with or without sufficient reason, have appeared, and still appear to me, of difficult solution and doubt. While my mind was in this condition on the matter, I found from the Lord Chancellor and Sir G. J. Turner, L. J., that they had made up their minds, and were agreed as to the proper mode of dealing with the case — a circumstance which rendered it necessarily unimportant what my view of the case might ultimately be; and I thought it, consequently, better for the parties that they should not be kept longer in suspense by reason of my undetermined state of opinion — a state which might not soon end, or which might possibly be never wholly removed. I requested their lordships accordingly not further to postpone disposing of the appeal. This their lordships have now done, the judgment of the court being one to which, possibly, a more prolonged consideration of the questions in dispute between the parties might have brought me to assent, though at present I do not do so.

Appeal dismissed.

Ex parte SEWELL; In re, SHAW, a Bankrupt.¹

February 24, 1853.

Bankrupt Law Consolidation Act, s. 20, Construction of — Change of Venue.

Where, upon an application being made to the court of bankruptcy in London, the senior commissioner, having transacted the business before him, had left the court for the day, this was held to be an unavoidable absence within the meaning of the 20th section of the Bankrupt Law Consolidation Act, so as to enable a junior commissioner, then present in court, to act for the senior commissioner in the matter of the application.

Where the petition of adjudication had been filed in the country district in which the bankrupt resided and had his property, but the great majority of the creditors resided in London and elsewhere, out of the district in which the petition had been filed, the court, upon the application of one of such creditors, made with the consent of the others, directed the removal of the petition, and of proceedings thereunder, from the country district to the court of bankruptcy in London.

The bankrupt resided and carried on business at Lincoln, which is in the Leeds district, and the adjudication was obtained on the 1st January, upon the petition of the bankrupt himself, in the Court of

¹ 17 Jur. 333.

Ex parte Sewell; In re Shaw.

Bankruptcy at Hull, for that district, and an official assignee, resident at Hull, duly appointed. The amount of the bankrupt's liabilities was 1,858*l.*, and his estate consisted principally of stock in trade and effects at Lincoln, which had been furnished to him by creditors resident in London. It appeared that upwards of three fourths of the creditors in point of value were resident, not within the Leeds district, but at Birmingham and London; and that, of the bankrupt's liabilities, only 75*l.* in amount was due to creditors at and within fifty miles of Lincoln. At a meeting for the choice of creditors' assignees, held at Hull, on the 26th January, one Sewell, a London creditor for 440*l.*, was proposed, at the instance of creditors for sums to the amount of 652*l.*, but the commissioner declined to appoint him, on the ground that he resided at London; and the meeting for the choice of assignees was adjourned.

On the 28th January, at the instance of Sewell, and with the consent of the principal part of the London and Birmingham creditors, an order was obtained from the Court of Bankruptcy in Basinghall Street, London, that the petition of adjudication, and all proceedings thereunder, should be taken off the file of the Bankruptcy Court for the Leeds district, and be removed to the Court of Bankruptcy in London, and there filed; and that the official assignee already appointed at Hull should be removed, and in his place one of the official assignees of the Court of Bankruptcy in London should be appointed official assignee of the estate and effects of the bankrupt; and that the costs of Sewell, occasioned by the application in London should be paid out of the estate. This order was made without notice either to the official assignee appointed at Hull, or to the bankrupt, by Mr. Commissioner Fane, the junior commissioner, acting for Mr. Commissioner Evans, the senior commissioner, who, at the time the application was made, had left the Court of Bankruptcy for the day, after having attended there till four o'clock in the afternoon, and concluded the business brought before him up to that time.

On the 11th February an order was obtained by the bankrupt from Mr. Commissioner Evans, upon notice to Sewell, that the petition of adjudication, and proceedings thereunder, should be retransferred to the Court of Bankruptcy for the Leeds district, his Honor holding, first, that the order of Mr. Commissioner Fane of the 28th January was a nullity, and *ultra vires* of the junior commissioner, inasmuch as it was made in the absence of the senior commissioner, which absence was not an unavoidable absence within the meaning of the 20th¹ section of the Bankrupt Law Consolidation Act, 1849; secondly, that even if it were not a nullity, it ought not to have been obtained *ex parte*, and was therefore irregular; and, thirdly, that that order was wrong upon the merits. An application was then made, upon affidavits of merits, by Sewell, with the consent of the general body

¹ The 20th section enacts, "that any of the commissioners acting in London may, during the vacation, or during the illness or unavoidable absence of the senior commissioner, exercise and perform the duties imposed upon the senior commissioner by this act."

Ex parte Sewell; In re Shaw.

of the London and Birmingham creditors, to Mr. Commissioner Evans, for an order calling on the parties to be affected thereby to show cause why an order should not be made that the petition of adjudication, and all proceedings thereunder, should not be removed from the Leeds to the London district, and be there filed and further prosecuted, the bankrupt being paid out of the estate his reasonable expenses of travelling to and attending in London under the said petition. The commissioner having refused to make the order asked, the application was now renewed, upon notice, by way of appeal to this court.

James Russell, Q. C., and Sturgeon, in support of the appeal. It was imperative upon the bankrupt to file this petition of adjudication in the Leeds district, for by the 90th section of the Bankrupt Law Consolidation Act it is enacted, "that every petition for adjudication of bankruptcy against or by any trader liable to become bankrupt shall be filed and prosecuted in the court within the district of which such trader shall have resided or carried on business for six months next immediately preceding the time of filing such petition, except where otherwise in the act is specially provided: provided always, that the senior commissioner shall have power, whenever he may deem it expedient, to order and petition against, or by any trader to be prosecuted in any district, with or without reference to the district in which the trader shall have resided or carried on business, or to consolidate the proceedings, or any part thereof, under two or more petitions for adjudication of bankruptcy, or to impound any petition for adjudication of bankruptcy, and the proceedings thereunder, and the prosecution or the further prosecution thereof, from the court in any one district to the court in any other district." It is submitted, however, that as by far the greater portion of the creditors, as well as the witnesses of the transactions leading to the bankruptcy, reside in London, the senior commissioner ought, in the exercise of the jurisdiction given to him by the statute, to remove the proceedings to the London district. It is submitted also, that the absence of the senior commissioner arising from his having transacted the business before him, and left the court for the day, when the application by Mr. Sewell was made, was an unavoidable absence within the meaning of the 20th section of the statute, and that the junior had, therefore, jurisdiction to act for the senior commissioner.

Swanston, Q. C., and Cooke, for the bankrupt.

Bacon, Q. C., for the official assignee. Upon the merits of the case, there is no ground for the removal of the proceedings to London. The mere circumstance that the great majority in value of the creditors, and most of the witnesses, reside out of the limits of the country district, is not sufficient. The absence of the senior commissioner was not what is meant by an unavoidable absence in the 20th section of the statute, and therefore the order of Mr. Commissioner Fane is null as *ultra vires*.

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KNIGHT BRUCE, L. J. The question in this case arises under the bankruptcy of a bookseller, stationer, dealer in musical instruments and music, and a toymen, at Lincoln. He made himself a bankrupt at Lincoln, which is in the Leeds district, and accordingly it was, I suppose, necessary that the bankruptcy should be opened, in the first instance at least, within that district, and the business of the administration of the bankruptcy, at least in the first instance, be carried on at Leeds or Hull, each in a different county from Lincoln, and each at a considerable distance from it. It appears, however, that the great bulk of the bankrupt's creditors, I think more than three fourths in amount, resided in London and at Birmingham. It appears also, that the majority in value of the bankrupt's creditors were desirous that the operations in the bankruptcy should be carried on in London; and considering the position of Hull with reference as well to Birmingham and London as to Lincoln, and the position of Birmingham and Lincoln with reference to London, I have no doubt whatever, after having heard all that has been urged in respect of the merits of the case, that the interests of the creditors generally, and the interests of justice, so far as there is any difference in the terms, will and must be consulted by having the bankruptcy carried on in London rather than at Hull. That renders it necessary to consider the question of jurisdiction, there being no doubt upon the merits.

With respect to the question of jurisdiction, my impression is, that the order made by the senior commissioner on the 11th instant, at variance as it is, if intended to be at variance as it is, to the order made by another learned commissioner, Mr. Fane, was an order without jurisdiction—an opinion which I give independently of any question whether the order of Mr. Commissioner Fane was or not strictly regular. Into that latter question I decline to enter, thinking it entirely unnecessary. I think, as I believe does also my learned brother, that on the merits, and substantially, the order of Mr. Commissioner Fane was entirely right, and that the correct order to make will be one in its terms to be regulated by that order. We think also that the choice of Mr. Sewell as assignee should stand, but entirely without prejudice to the discretion of the London commissioner whom this case shall come before to effect a new choice of assignees, should he think fit to make one. With regard to the costs of the present application, we think the appellant's costs should come out of the estate; we think costs, not exceeding 10*l.*, should be allowed to the bankrupt; that costs also of this application, not exceeding 10*l.*, be allowed to the assignee of Leeds. We are of opinion that the costs incurred of the application to Mr. Commissioner Evans, which produced the order of the 11th February, should be borne thus—that Sewell should have his out of the estate, and that the bankrupt should be allowed none.

TURNER, L. J. This case involves two questions—one, that of the jurisdiction; the other, that of expediency. The order of the 28th January having been obtained, a subsequent application is made to Mr. Commissioner Evans, the senior commissioner, to take back the

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proceedings from London to Hull. Now; it is quite clear that the junior commissioner had no power, either under the statute or the general orders in bankruptcy, to make the order which he did, in the absence of the senior commissioner, unless that power is given to him by the 20th section of the statute, which says — [his lordship read the section of the statute.] I am of opinion, that as the senior commissioner was not in court when the order in question was applied for, but, having performed his functions for the day, had left the court, he must be considered as having been unavoidably absent within the meaning of the 20th section of the statute, and consequently that it was in the power of Mr. Commissioner Fane to make the order which he did; and that the order afterwards made by Mr. Commissioner Evans to take back the proceedings to Hull was an order *ultra vires*, while the order of Mr. Commissioner Fane remained undischarged. With reference to the question of expediency, I think it plain that it will be for the convenience and benefit of the great majority of the creditors that the proceedings in this bankruptcy should be prosecuted in London. In my opinion, therefore, the order is wrong, both upon the merits and on the ground of want of jurisdiction.

M'DONALD v. BRYCE.¹

March 15, 1853.

Will — Construction — Contingent Bequest — Scotch Probate.

Bequest of residue unto R. S., the son of P. S., for his sole use and benefit, at twenty-one; failing him, to the next male child of P. S., who should attain that age; and failing male children of P. S., to the seven daughters of A. B., the survivors and survivor of them, in equal proportions, their respective shares to be at their free will and disposal. R. S. died before twenty-one, and P. S., having survived all the daughters of A. B., died in September, 1852, without having had any other male child: —

Held, that the residue belonged to the next of kin of the testator.

A Scotch probate is not recognized by the court of chancery in England.

THIS case now came before the court on a petition presented by the legal personal representatives of the seven daughters of Lewis M'Pherson, who were the contingent residuary legatees named in the will of Robert Shawe, deceased, and they sought to have paid and transferred to them the sums of 16,537*l.* 18*s.* 9*d.* Bank Annuities, 3333*l.* 6*s.* 8*d.* like stock, and two sums of 240*l.* 16*s.* 8*d.* and 48*l.* 10*s.* 10*d.* cash, the whole of which stock and cash constituted the residue of the testator's estate and effects, which the petitioners alleged had become divisible among them by the death of Peter Shawe without

¹ 17 Jan. 335.

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having had any male child who attained the age of twenty-one years. The cause was before the court on other points in the year 1838, and is reported in 2 Jur. 295, and 2 Kee. 276. The facts of the case were as follows:— Robert Shawe, by his will, dated the 20th March, 1812, bequeathed unto Ann, Margaret, and Elizabeth M'Pherson, the daughters of the late Lewis M'Pherson, an annuity of 25*l.* each during their natural lives; and after directing the same to be paid without deducting income-tax, the testator "gave and bequeathed unto Peter Shawe, of Glasgow, weaver, the natural son of his brother, John Shawe, the sum of 100*l.* annually for life; and he willed and bequeathed unto Mrs. Christie Grant, Mrs. Isabella M'Donald, Mrs. Mary M'Donald, and Mrs. A. M'Lean, daughters of the afore-mentioned Lewis M'Pherson, the sum of 100*l.* sterling each; and the residue of his property he willed and bequeathed unto Robert Shawe, the eldest son of the afore-mentioned Peter Shawe, for his sole use and benefit, upon the said Robert Shawe coming of age; failing him, to the next male child procreate of the body of the aforesaid Peter Shawe, and lawfully begotten, who should attain the age of twenty-one years; failing the male children of the said Peter Shawe lawfully begotten, to the aforesaid legatees, and survivors and survivor of them, in equal proportions, namely, the said Ann, Margaret, and Elizabeth M'Pherson, and Mrs. Christie Grant, Mrs. Isabella M'Donald, Mrs. Mary M'Donald, and Mrs. M'Lean, all daughters of the afore-mentioned Lewis M'Pherson, their respective shares to be at their free will and disposal. And the testator appointed his executors, Francis Duncan and Alexander Bryce, guardians of the said Robert Shawe during his minority; and he directed that they should apply the dividends arising from the property belonging to him which might remain after paying the different legacies, and setting apart a sufficient sum for the payment of the annuities thereinbefore bequeathed, together with his funeral expenses, to the maintenance, education, and benefit of the said child, as they should judge most advantageous for him; and in the event of his death before his reaching the age of twenty-one years, the testator constituted and appointed the said Francis Duncan and Alexander Bryce, and the survivor of them, to be guardians and guardian to the male child lawfully begotten of the aforesaid Peter Shawe who might succeed according to the before-recited disposition, with power to the said Francis Duncan and Alexander Bryce, and the survivor of them, as guardians and guardian, to apply the dividends aforesaid to the purposes above mentioned." Robert Shawe, the testator, died on the 11th April, 1812, and Robert Shawe, the son of Peter Shawe, died in August, 1814, about the age of eight years. At the time of Robert Shawe's death, all the daughters of Lewis M'Pherson were living; but between that period and the time of Peter Shawe's death, all of them had died. Peter Shawe died on the 8th September, 1852, without having had any other male child than the said Robert Shawe.

Glasse, Q. C., and Selwyn, for the petitioners, the representatives of the contingent residuary legatees under the will of Robert Shawe,

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contended that they were entitled to the residue. The period of vesting must be fixed at either the death of the testator or that of Peter Shawe's son Robert; and all the daughters of Lewis M'Pherson, being alive at the latter period, acquired vested interests. The case of *Cripps v. Wolcott*, 4 Mad. 11, was no authority in this court, it having been decided in opposition to the rule laid down in *Wilson v. Bailey*, 3 Bro. P. C. 195, Tomlin's ed., and which case had since been followed by *Doe d. Long v. Prigg*, 8 B. & Cr. 231; *The Commissioners of Charitable Donations and Bequests*, 1 Dru. & W. 498; *Wordsworth v. Wood*, 4 My. & C. 641; 1 H. L. C. 199; *Pearson v. Casamajor*, 1 Mac. & R. 685; *Shailer v. Groves*, 6 Hare, 162; and *Rogers v. Towsey*, 9 Jur. 575.

R. Palmer, Q. C., and *Prout*, for some of the next of kin of Robert Shawe, the testator, argued, that as the deaths of all the daughters of Lewis M'Pherson took place in the lifetime of Peter Shawe, the contingent bequest to them had failed, and the residue was therefore undisposed of, and belonged to the next of kin. The words "survivors or survivor of them," must be read to mean survivors at the time of Peter Shawe's death, and not at the testator's or Robert Shawe's death. The case of *Cripps v. Wolcott* was in point, and one which the court ought to follow. They referred to 2 Jarm. Wills, 641, ed. 1844, and the cases there cited, of *Brgrave v. Winder*, 2 Ves. jun. 634; *Newton v. Ayscough*, 19 Ves. 534; *Daniel v. Daniel*, 6 Ves. 297; 2 Rep. Leg. 1388, ed. 1847; and the cases of *Gibbs v. Tait*, 8 Sim. 132; *Blewett v. Roberts*, 2 Cr. & Ph. 274; *Pope v. Whitcombe*, 3 Russ. 124; *Taylor v. Beverley*, 1 Coll. 108; and *Neathway v. Reed*, 17 Jur. 169; s. c. *ante*, p. 150.

Anderson, Q. C., and *Messiter*, appeared for other next of kin of the testator, and cited *Hoghton v. Whitgreave*, 1 J. & W. 146, and *Williams v. Tarrt*, 2 Coll. 85.

Glasse, in reply.

ROMILLY, M. R. I am of opinion that the case of *Cripps v. Wolcott* is binding upon me. Followed as it has since been by so many authorities, I shall undoubtedly follow it until it is reversed by the House of Lords, if it ever should be reversed, which I do not think very probable. The question I have to consider in this case is, whether it is distinguishable from the case of *Cripps v. Wolcott*, and whether the circumstance that a life interest was given there, while here there was a previous interest given to Robert Shawe, and on his death to the children of Peter Shawe, and that Peter Shawe took no interest in the residue, does in fact distinguish this case from the principle and rule laid down in the case of *Cripps v. Wolcott*. Upon the fullest consideration of this case, I am of opinion that it does not distinguish it in any respect; and I concur in the observations which have been made at the bar on behalf of the next of kin, that as this gift was necessarily contingent until it could be ascertained that Peter

Cross v. Thomas.

Shawe had died without male issue, (which of course could not possibly be ascertained before his death,) there is no substantial distinction between this case and *Cripps v. Wolcott*. I am of opinion, therefore, that I must follow *Cripps v. Wolcott*, and hold that the next of kin are entitled, and not the residuary legatees, in the events which have happened.

Anderson said that some of the next of kin for whom he appeared were represented by their administrator, who had taken out a Scotch probate, and he had to ask his Honor whether he thought the letters of administration of the Consistory Court of Scotland sufficient to enable him to receive their shares without taking out probate in England. They were domiciled in Scotland, but the property to be divided was in England.

ROMILLY, M. R. I think it is impossible, in the present state of the law, that I can allow that to be done. The parties must proceed in the usual way.

CROSS v. THOMAS.¹

March 18, 1853.

Practice — Entering Appearance — 15 & 16 Vict. c. 86, s. 52.

Leave given to enter an appearance for the assignees of a defendant who had become bankrupt, the assignees having been served with an order, under the 52d section of the 15 & 16 Vict. c. 86, and not having appeared thereto.

IN this case one of the defendants had become bankrupt, and assignees of his estate were appointed. They were served by the plaintiff with a supplemental order, pursuant to the requisitions of the 52d section of the 15 & 16 Vict. c. 86, but they had neglected to appear thereto.

Beavan now moved, on behalf of the plaintiff, for an order that he might be at liberty to enter an appearance for the assignees.

ROMILLY, M. R., made an order to that effect.

In re Page.

*In re PAGE.*¹

March 18, 1853.

Practice — Married Woman — Application to sue without a next Friend.

A married woman cannot institute a suit *in formâ pauperis* without the intervention of a next friend.

THE facts of this case are sufficiently stated in the judgment.

ROMILLY, M. R. In this case an application *ex parte* was made in January last, for an order to permit a married woman to file a bill *in formâ pauperis* in respect of her separate estate, without the usual intervention of a next friend, and the case of *Wellesley v. Wellesley*, 16 Sim. 1, was cited as an authority for making the order. I then gave the necessary permission for that to be done. In February another motion was made to discharge the order of January, on the ground of irregularity, and I took time to consider the point. I am now of opinion that the order of January was irregular, and therefore cannot stand. The case of *Wellesley v. Wellesley* is no authority on the present occasion, for in that case Lady Mornington had previously filed her bill in the ordinary manner, and she only applied to the court for leave to prosecute a suit which had been regularly instituted by the assistance of a next friend. The court granted leave for that to be done. Lately an application was made to the lords justices in *re Hakewill*, upon the authority of *Wellesley v. Wellesley* and of the order I made in this case, for leave to allow Mrs. Hakewill, a married woman, to present a petition without the intervention of a next friend. That application was made under the provisions of the 2 & 3 Vict. c. 54, (Mr. Justice Talfourd's Act,) for the purpose of enabling the petitioner to have access to her children. The lords justices, after some hesitation, granted the application, Sir R. T. Kindersley, V. C., having previously refused to make the order, as he doubted whether he had sufficient authority. This case is quite distinct from that of *re Hakewill*. It is not the ordinary case of a person who files a bill in the regular course, and then obtains an order to sue *in formâ pauperis* in order to prosecute a suit already instituted. The motion also was made *ex parte*, which obviously ought not to have been done. It was irregular in every way, and therefore must be discharged, but without costs, as the court did not refuse the application when the motion was made in January.

Terrell for the motion to sue *in formâ pauperis*.

Hislop Clarke, for the motion to discharge the order of January.

Barham v. Clarendon.

BARHAM v. THE EARL OF CLARENDON.¹

November 16 and December 17, 1852.

Exoneration — Covenant to discharge Lands of Legacies.

J. F., by will, charged certain real estates with the payment of four legacies of 5,000*l.* each, and left the estates so charged to J. B. By his marriage settlement, J. B. covenanted with the trustees of the settlement to discharge the lands, and to pay the legacies, and to settle the lands, free from the legacies, to certain uses, the usual uses and trusts upon a marriage. He, however, only paid off one of the said four legacies, and died. In a suit between his personal representatives and the persons entitled to the real estate: —

Held, that the land was, by the covenant in J. B.'s marriage settlement, entitled to be exonerated out of his personal estate.

THIS was a special case under Sir G. J. Turner's Act, 1850. Joseph Foster Barham, by his will, dated the 22d June, 1832, gave all his freehold, copyhold, and leasehold lands and hereditaments, situate, lying, and being in, or near, or adjacent to Stockbridge, in the county of Southampton, with the appurtenances, to and to the use of John Barham and the Earl of Thanet, their heirs, executors, &c., to raise, by sale, mortgage, &c., the following legacies, namely, 5,000*l.* to each of his four younger children, William Joseph Barham, Charles Henry Barham, Mary Barham, and Caroline Gertrude Barham; and subject to the payment of the four legacies, and of the debts and funeral expenses of the testator, he devised the same to his son John Barham, absolutely. The testator died in September, 1832. By indentures of lease and release, dated the 13th January, 1834, (being the settlement on the marriage of John Barham and Lady Elizabeth Grims-ton, afterwards the Countess of Clarendon,) reciting that the said John Barham "was equitably seised in fee of the real estates at Stockbridge, in the county of Southampton, therein described, subject nevertheless to the said four legacies of 5,000*l.* each;" and reciting also that the said John Barham was entitled in fee to certain hereditaments in Westmoreland; and reciting "that upon the treaty for the said marriage, the said John Barham agreed to covenant to pay off, within six months from the date thereof, the said four sums of 5,000*l.* so charged upon the said estates in the county of Southampton, and to settle the same discharged therefrom, together with other hereditaments, in manner thereafter mentioned;" the said John Barham proceeded for himself, his heirs, &c., to covenant with the said trustees, that in case the said marriage should take effect, he would, within six months after the solemnization thereof, pay off the said four several sums of 5,000*l.* each, and all interest, and within the same period of six months would procure the said hereditaments to be well and effectually released therefrom, and from all claims and demands in respect thereof, and well and effectually conveyed to and

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vested in the said trustees in fee, upon the trusts thereafter declared. John Barham then conveyed to the said trustees all the said hereditaments in Westmoreland and Southampton, to hold the same freed and discharged, as to the lands in Southampton, of and from the said four several sums of 5,000*l.* each, to the use of trustees for ninety-nine years, for securing pin-money, with remainder to John Barham for life, remainder to the intended wife (now the Countess of Clarendon) for life, (declared to be in satisfaction of all dower, thirds, &c.,) remainder to trustees for 500 years for raising portions, remainder to John Barham in fee.

The marriage took place on the 14th January, 1834. John Barham died on the 22d May, 1838, intestate, and without issue, leaving his said brother, William Joseph Barham his heir at law, and his widow, and his said two brothers and two sisters, the only persons entitled to his personal estate under the Statute of Distributions. Administration was on the 6th July, 1838, granted to his widow. The interests of the said Mary Barham and Caroline Barham were now vested in the trustees of their respective marriage settlements, Mary Barham having married the defendant Gaggiotti, and Caroline Barham the defendant Robins. On the 4th June, 1839, the widow of John Barham married the Earl of Clarendon.

On the 7th August, 1839, the said William Joseph Barham made his will, whereby he devised and bequeathed all his real and personal estate to the said Charles Henry Barham, whom he appointed his sole executor, and died on the 26th June, 1840. Charles Henry Barham duly proved the will. John Barham in his life had paid off one sum of 5,000*l.*, namely, the legacy of 5,000*l.* to the said Charles Henry Barham, but not the other three legacies of 5,000*l.* each. By indenture of the 22d January, 1841, to which the Earl and Countess of Clarendon, Charles Henry Barham, Mr. and Mrs. Gaggiotti and their trustees, and Mr. and Mrs. Robins were parties, reciting certain proceedings in this court, it was agreed to stay all proceedings, except such as should be necessary for the decision of two questions, one of which was, whether the said Countess of Clarendon, as administratrix of the said John Barham, was entitled, as against the owner of the Stockbridge estates, to have the said three legacies of 5,000*l.* each, then about to be discharged out of the personal estate of John Barham, kept on foot for her benefit; and it was agreed that 5,000*l.* should be paid to the trustees of Mrs. Robins's settlement, to the trustees of Mrs. Gaggiotti's settlement, and to Charles Henry Barham, as the executor of William Joseph Barham, respectively, in discharge of the three legacies remaining still unpaid. The countess was thereupon to be let into possession of the Stockbridge estates, and the three charges were to be assigned to two trustees, to be kept on foot till the decision of the court should be taken on the above question. The three legacies were paid accordingly, but no further assignment of the charges was actually executed. It had been determined to obtain the decision of these questions on a special case, and the present case was prepared accordingly. All proper parties were before the court.

Barham v. Clarendon.

The questions upon which the opinion of the court was requested were — first, whether, as between the Countess of Clarendon and Charles Henry Barham, the personal and real representatives of the said John Barham, his general personal estate was liable to exonerate the Stockbridge estates from the three sums of 5,000*l.* which he had not paid in his lifetime, or any and which of them; secondly, whether the said Countess of Clarendon, on payment of the said three legacies under the said agreement of the 22d January, 1841, was entitled to have the legacies kept on foot as subsisting charges, and whether they were or not subsisting charges as against the Stockbridge estates, for the purpose of recompensing the personal estate of the said John Barham.

Rolt and *Charles Hall*, for the plaintiffs, seeking to throw the primary liability on the personal estate. The general rule is, that on a simple transfer of mortgage by the heir, or other such transaction, an undertaking by the transferee to pay the debt is not sufficient to exonerate the land. But here John Barham had covenanted to pay these charges, not merely as a further security, but adopting it as a personal debt, with the specific object of exonerating the land, and that not on a voluntary contract; but this may have been, and apparently was, a condition on the marriage treaty. *The Earl of Oxford v. Lady Rodney*, 14 Ves. 417; *Barham v. The Earl of Thanet*, 3 My. & K. 607. It has been in part acted on, John Barham having paid one portion in his lifetime. *Davenport v. Bishopp*, 2 Y. & C. C. 462. See also *Woods v. Huntingford*, 3 Ves. 128, where the rule is stated by Lord Alvanley; *Parsons v. Freeman*, stated in Cox's note' 2 P. Wms. 664; *Barry v. Harding*, 1 Jo. & Lat. 475; *Donisthorpe v. Porter*, Amb. 600; *Kekewich v. Manning*, 1 De G., Mac. & G. 176; s. c. 12 Eng. Rep. 120, and *Hedges v. Hedges*, 16 Jur. 634; s. c. 12 Eng. Rep. 331.

W. P. Wood and *G. Y. Robson*, for the defendants Lord and Lady Clarendon and Mr. Gaggiotti. A mere covenant to pay like the present is not sufficient to show that the covenantor intended to make the debt his own. This is merely a covenant to indemnify the estate, not to relieve it from its liability, which remains as before. This covenant is not entered into with the encumbrancers, but only with the parties, claiming under the settlement. [They also cited and relied on the rule as stated in *Woods v. Huntingford*, *Hedges v. Hedges*, &c.] Here there is no merger. Payment of the charge would not merge it; *a fortiori* a mere covenant to pay will not do. *Barham v. The Earl of Clarendon*, 1 Y. & C. C. 618. The indemnity was merely to be for the benefit of the wife and children of John Barham, against whom it is now sought to enforce it. *The Earl of Ilchester v. The Earl of Carnarvon*, 1 Beav. 209; *The Earl of Clarendon v. Barham*, 1 Y. & C. C. 68.

Jessel, for Mrs. Gaggiotti and her trustees.

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Leach, for Mr. and Mrs. Robins and their children.

Rolt, in reply.

Leckmere v. Charlton, 15 Ves. 193, and *Ex parte Digby*, Jac. 235, showing the question to be one of intention, were also quoted.

December 17. TURNER, V. C., (after stating the circumstances, and the questions stated for the opinion of the court.) In determining these questions, the payment of the portions by Lady Clarendon is to be laid out of the case; for by the agreement of the 22d January, 1841, the rights of the various parties are not to be prejudiced. The portions are to be paid, and in the mean time the charges are to be assigned to trustees, to be kept on foot for the benefit of the person who may be entitled. The true question is, whether the heir is entitled to have the estate exonerated. On the one hand, it is argued, on his behalf, that he is to be considered as a purchaser under the settlement; on the other hand, it is urged that he is a mere volunteer. I think the plaintiff's claim cannot be maintained. It could not be contended that the wife, on her marriage settlement intended to stipulate on behalf and for the benefit of her husband's heirs; *a fortiori* it could not be said that on that settlement, stipulating with her husband, she intended to stipulate on his behalf.

The authorities cited do not exactly govern the present case. They were either cases of covenant by a party binding his heirs on a transfer of mortgage, or by a purchaser binding his heirs on a purchase out and out. These cases have settled that such covenants do not constitute the sums, so undertaken to be discharged, the proper debt of the covenantors. That would throw a liability where it was not intended. But the intention to constitute such sums the proper debt of the covenantors, may be proved by other circumstances; and other cases were cited upon questions of indemnity. There the same distinction may be taken. Nor is this a covenant for indemnity merely. In all the cases cited the question was, whether the party had adopted the debt, and made it his own. Here, there is no doubt, John Barham has made this his own debt; the only question is, whether he has made it so as between his real and personal representatives. When a man covenants to lay out a sum of money in the purchase of an estate, the money is converted into land, not only as regards his wife and children, but also as regards his heir. The plaintiff's case is much assisted by what was said in *Corring v. Nash* and *Davenport v. Davenport* against splitting provisions of this description; and it was argued that if Lady Clarendon had died without issue the covenant could not have been enforced. But that case would have been very different from the present; the money would in that case have been at home. As to costs, the plaintiff has, it is true, not succeeded in the claim which he has made; but, on the other hand, he has obtained the benefit of this decision at no great expense, and I do not think it is a case which calls for costs on either side.

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EVANS v. SAUNDERS.¹

January 29 and 31, and February 26, 1853.

Power — Appointment — Revocation.

A., having under a settlement a general power of appointment either by deed or will, appointed by several successive deeds, in each deed revoking former appointments, and reserving powers of revocation and new appointment by deed only. By a deed-poll she afterwards revoked the last deed of appointment. By her will she made a devise, purporting to be in exercise of her original power of appointment:—

Held, that after the execution of the first deed of appointment the original power was gone, and therefore that the will of A. was inoperative.

By indentures of lease and release, dated the 15th and 16th March, 1794, being the settlement made on the marriage of John Evans and Anne Evans, certain hereditaments were conveyed to certain uses during the lifetime of John Evans and Anne Evans, with remainders to their children; with remainder to the use of such person or persons, for such estate and estates, interest and interests, to take effect at such time or times, in such manner and form, as the said Anne Evans, notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by her in the presence of, and attested by, two or more credible witnesses, or by her last will and testament in writing, or any writing or writings in the nature of a will, or by any codicil or codicils to be by her signed, sealed, and published in the presence of three or more credible witnesses, should from time to time, and as often as she should think fit, devise, direct, limit, or appoint; with limitations over in default of appointment.

By an indenture, dated the 5th June, 1830, after reciting the above-mentioned power, and that Anne Evans was desirous and had determined to exercise her said power of appointment in such manner as was thereafter expressed, subject to the power of revocation and new appointment thereafter contained, it was witnessed, that the said Anne Evans, in pursuance of and in exercise and execution of the power or authority, powers or authorities, given to her by the said indenture of settlement, and in exercise and execution of all and every other power or powers, authorities or authority enabling her in that behalf, did thereby direct, limit, and appoint that the hereditaments comprised in the said indenture of settlement should, after the determination of the estate and interest limited prior to the said power of appointment, remain and be to the uses, upon the trusts, and for the ends, intents, and purposes thereafter declared; and it was thereby provided, and the said Anne Evans did thereby reserve to herself full power and authority, at any time or times thereafter,

¹ 17 Jur. 838; 22 Law J. Rep. (N. S.) Chanc. 471; 1 Drewry, 415.

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by any deed or deeds, to be sealed and delivered by her in the presence of, and to be attested by, two or more credible witnesses, to alter, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all or any of the uses thereinbefore limited, of and concerning the said messuages, lands, and hereditaments thereby appointed, or intended so to be, or any of them, or any part thereof; and by the same or any other deed or deeds, to be sealed, delivered, and attested as last therein mentioned, to make any other direction or appointment, which might have been made under and by virtue or means of the power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and hereditaments, and the estate and interest therein, to which such revocation should extend.

By an indenture, dated the 5th July, 1833, and made between the said Anne Evans of the one part, and Alfred Thomas and the said Lewis Evans, of the other part, after reciting the hereinbefore-mentioned indentures of the 15th & 16th March, 1794, and the 5th June, 1830, and reciting that the said Anne Evans had not in any manner exercised the said power of revocation and new appointment limited to her by the lastly thereinbefore-recited indenture, and reciting that the said Anne Evans was desirous of exercising her said power of revocation and new appointment in manner and to the effect thereinafter expressed, and also of substituting Alfred Thomas as a trustee, in the place of William Davis, therein mentioned, it was witnessed, that by virtue and in exercise and execution of the power and authority to the said testatrix, Anne Evans, for that purpose given, limited, or reserved by the lastly thereinbefore-recited indenture, and in pursuance and in exercise and execution of every other power and authority enabling her in that behalf, the said Anne Evans did thereby revoke, determine, and make void all and every the use and uses, estate and estates, trust and trusts, powers and limitations, in the said thereinbefore in part recited indenture of appointment contained, or thereby limited or appointed, of and concerning all and every the messuages, lands, and hereditaments thereby appointed, or intended so to be; and it was thereby provided, and the said Anne Evans did thereby reserve to herself full power and authority, at any time or times thereafter, by any deed or deeds, to be sealed and delivered by her in the presence of, and to be attested by, two or more credible witnesses, to alter, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all and every or any of the uses, trusts, intents, purposes, powers, provisos, limitations, declarations, and agreements thereinbefore limited, expressed, and declared, of and concerning the said messuages, lands, and hereditaments thereby appointed, or intended so to be; and by the same or any other deed or deeds, to be so sealed and delivered and attested as therein last mentioned, to make any other direction or appointment, which might have been made under or by virtue or means of the original power of appointment reserved to her as therein aforesaid, of and concerning so much and such part

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of the said messuages, lands, and hereditaments, and the estate and interest therein to which such revocation should extend.

By another indenture of revocation and new appointment, dated the 16th July, 1835, and made between the said Anne Evans of the one part, and the said Alfred Thomas and Lewis Evans of the other part, and duly executed and attested by the said Anne Evans, after reciting the hereinbefore-mentioned indentures, and that the said Anne Evans was desirous of exercising the said last mentioned power of revocation and new appointment in the manner and to the effect thereafter expressed, it was witnessed, that by virtue and in exercise and execution of the power and authority to the said Anne Evans for that purpose given, limited, or reserved by the therein lastly-recited indenture, and in pursuance and in exercise and execution of every other power and authority enabling her in that behalf, the said testatrix, Anne Evans, did thereby revoke and determine and make void all and every the use and uses, estate and estates, trust and trusts, powers and limitations, in the said lastly thereinbefore in part recited indenture of appointment contained, or thereby limited or appointed, of and concerning all and every the messuages, lands, and hereditaments thereby appointed, or intended so to be; and did limit, declare, and appoint that immediately thereafter all the said messuages, lands, and hereditaments should, from and after the determination of the estates and interests prior to the said power of appointment of the said Anne Evans, remain and be to the uses, upon the trusts, and for the ends, intents, and purposes thereafter limited and declared of and concerning the same; and it was thereby provided, and the said Anne Evans did thereby reserve to herself full power and authority, at any time or times thereafter, by any deed or deeds, to be sealed and delivered by her in the presence of, and attested by, two or more credible witnesses, to alter, change, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all and every or any of the uses, trusts, intents, purposes, powers, provisos, limitations, declarations, and agreements thereinbefore limited, expressed, and declared, of and concerning the same messuages, lands, and hereditaments thereby appointed; and by the same or any other deed or deeds, to be so sealed and delivered and attested as last mentioned, to make any other direction or appointment, which might have been made under or by virtue or by means of the original power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and hereditaments, and the estate and interest therein, to which such revocation should extend.

By a deed-poll, made in the year 1836, under the hand and seal of the said Anne Evans, and duly attested, after reciting the above-mentioned indentures, it was witnessed, that by virtue and in exercise of the power and authority to the said Anne Evans given by the last mentioned indenture, and in exercise and execution of every other power and authority in anywise enabling her in that behalf, the said testatrix, Anne Evans, did absolutely revoke, determine, and make void all and every the use and uses, estate and estates, trust and

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trusts, powers and provisos, declarations and limitations, in and by the said lastly thereinbefore-recited indenture of appointment of the 16th July, 1835, contained, concerning the several messuages, lands, tenements, and hereditaments therein particularly described.

Anne Evans, by her will, dated the 3d March, 1848, after reciting the indentures of lease and release of the 15th and 16th March, 1794, respectively, and expressing her intention that her said will should be in exercise and execution of the power or authority so given or reserved to her as therein aforesaid, and of any other power or authority enabling her in that behalf, did give, devise, direct, limit, and appoint all the said messuages or tenements, farm, and lands unto the plaintiffs, upon the trusts therein mentioned.

The said Anne Evans died shortly afterwards, and the plaintiffs entered into possession, and contracted to sell part of the estate. The purchaser, however, objected to the title, contending that under the circumstances no valid appointment had been made under the deed of 1794, and that the persons mentioned in that deed as takers in default of appointment were now entitled. A special case was accordingly stated, in which the trustees under Anne Evans's will were plaintiffs, and T. J. Saunders, who claimed under the deed of 1794, and the purchaser, were defendants.

Malins and Pitman, for the plaintiffs.

Daniell and Greene, for the defendant, Saunders, contended that Anne Evans had, at the time of making her will, no power to devise the lands in question. Looking at the instrument creating the power, we find that there is a power given to appoint either by deed or will — a power, therefore, in the alternative. It was at the option of the testatrix to select either mode of executing it she pleased; but it is clear from the words that only one power was given to her. That being the case, let us now see what was the effect of the first deed, that of 1830. It is submitted that the effect of it was this — that the original power, having been executed, was completely gone, and that nothing further could be done by virtue of it. The donee of the power, having chosen to exercise her power by one of the means pointed out by the instrument creating the power, had no right to fall back on another, and say, "I have changed my mind, and will exercise the power in another manner." Such a construction would be quite contrary to all the cases decided on the point, and also to the opinion of Sir Edward Sugden. In *Hele v. Bond*, Sugd. Pow., App. No. 5, it was decided, that a party executing a power of revocation, without reserving a similar one in the deed executing the power, was completely *functus officio*, on the ground that, having executed the power, it was completely gone. Now, on principle there is no distinction between that case and the present. Here we have a power of appointment, given by the original instrument, fully exercised, and new powers reserved by the instrument executing it — a strong circumstance, too, to support our view of the case, as evidencing the intention of the parties to act under the new powers reserved. Ac-

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cording to *Hele v. Bond*, then, the power of appointment, having been fully exercised, was gone for ever, and any further limitation of the uses must be by virtue of the new powers reserved. If this be not so, it must be contended that there are two powers co-existent in the same person, and affecting the same estate, at the same moment; nay, if we suppose the power reserved to have ordered formalities differing from those prescribed by the original instrument, to be performed in different manners, this would be a state of things manifestly absurd. If this coexistence of the original power be not alleged, it must be said that the power is revived by the deed-poll of 1836. But it is submitted to the court that this doctrine of revival is one which cannot be supported by any of the cases on the subject, and is, on the contrary, opposed to the whole current of decisions. [1 Sugd. Pow. 470 et seq.; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 332; and *Ward v. Lenthall*, 1 Sid. 343; 2 Keb. 269, were cited.]

Glasse and Bevir, for the purchaser.

Malins, in reply. It is repugnant to common sense that a man having a power of appointment, and reserving in the deed executing that appointment a power of revocation, does not re-vest himself with the power of appointment he originally possessed. If this be not so, what effect do you give to the revocation? Clearly none, as the object of a revocation is to put yourself in the position in which you previously were placed. Now, the testatrix had a general or absolute power to appoint by deed or will. If she had appointed by deed, without power of revocation, *Hele v. Bond* would have applied, and she would have had no further power; but she foresees she may wish to alter her mind, and reserves a power to revoke, and also a power to appoint new uses, though this last power was unnecessary, and cannot affect the case. For even if the testatrix had deemed it requisite to reserve such a power of appointment, that misapprehension on her part would not alter the construction the law would place on such a deed. It is, then, quite irrelevant to say that the testatrix meant only to exercise by deed in future, apart from the improbability of her wishing to abridge any of her privileges or powers. In *Brudenell v. Elwes*, cited on the other side, it might have been supposed that the power was reserved there by virtue of a contract between the husband and wife. *Ward v. Lenthall* was contrary to all principle and authority, and overruled by Sir J. Wigram.

February 26. KINDERSLEY, V. C. The first question in this case is, whether a will operated to pass certain real estate by way of appointment, which, in fact, depends upon the question, whether, at the time when the testatrix made her will and at her death, she had any power of appointment. [His Honor then stated the case.] If she had a power of appointment, there is no question but that this will was a valid appointment — in other words, the only question is, whether the original power was at this time existing, and capable of being executed. Now, I have not found any authority to assist me directly in

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my endeavors to arrive at a correct opinion on this question; but I think it necessary to consider what was the effect of each successive instrument.

First, then, what was the effect of the deed of June, 1830? Now, it must be recollected, that at the time of the execution of that deed, by virtue of the settlement of 1794, and of the events that had happened, the lands stood limited to the use of Anne Evans for life, with remainders over; and then there was a general power of appointment; and in default of appointment, to certain uses, amounting to a fee; and the power was a power which enabled her to appoint either by deed or will. Now, it was suggested that this power of appointing by deed or will might be regarded as two powers — one by deed, and another, in default of deed, by will; but a power to appoint by deed or will is a single power, although the party had the option of exercising that power by either instrument; but the power itself is single. Then Anne Evans, having the option of exercising it by either, or partly by deed and partly by will, elected to exercise it by deed, and accordingly executed the deed of June, 1830, expressly for the purpose of exercising the power of appointment. After the determination of the prior estates, she limited the estate to certain uses, amounting to a fee. Now, if this deed had stopped there, it would be clear that there could be no question, and the new uses would take effect precisely as if they had been introduced into the deed of 1794 in lieu of the power of appointment, and the estates limited in default; and the lands would then stand limited in this way — to trustees for life, with remainder to the new uses of this deed. If the deed had stopped with the exercise of the power of appointment, the effect would be altogether extinguished and at an end, so as to exclude any future appointment, either by deed or will. That would have been the clear effect. But the deed did not stop there, but reserved to Anne Evans a power, by deed only, to revoke the uses appointed by that deed, either in whole or in part, and power to make any other appointment which might have been made under any other power in the original deed. In other words, it reserved a power of revoking the uses of this deed, and of substituting any other uses; and the reference to what she might have done under the deed of 1794, is merely for the purpose of pointing out to what extent she could revoke.

Then the question comes, did the reservation of these two powers in any way tend to keep alive or restore the original powers of appointment? Now, I must observe, that what is called a power of revocation and new appointment is, in fact, two distinct and separate powers. It is true that you can hardly suppose a power of appointing new uses without in some sense supposing a revocation of the old uses; but the power of revocation may exist without a power of new appointment. And another observation is this — that a power of new appointment which is thus reserved is a new power, altogether distinct from the original power. It is true that when the revocation is exercised, the use created under that power must be served out of the original seisin, just as in the exercise of the original power,

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notwithstanding it is not an original, but a new power; for it may be so reserved as to be exercised by a different species of instrument, and with different formalities from those in the original instrument, and even to a different person. Now, all this, of course, would be impossible, if a power of new appointment were the same as the original power; it must be distinct; and of course, if it be a new and distinct power when reserved and exercised by a different instrument or by a different person, it is not less a distinct power because it is to be exercised by the same person and with the same formalities as the original power. If, then, the power in the deed of 1830 was a new and distinct power, was the original power still subsisting after it had been executed, and a new general power created?

Now, in the first place, it appears, to say the least, extremely questionable whether it is legally possible that two distinct and independent general powers of appointing the same fee should coexist in the same donee. I never saw a case exhibiting such a remarkable phenomenon. It appears to me equally impossible, whether it be executed by the same or a different person. But this may be best exhibited by supposing that one deed must be attested by two witnesses, and the other by one witness. It would be strange if the same person had power to appoint by deed attested by one, and by deed attested by two witnesses. But supposing that possible, what is there in the present case to produce such an effect? What is there in the provisions of the deed of 1830 to cause the original power, though fully executed, still to retain its vitality, and remain capable of being executed? So far from finding any indication of an intention to keep it alive, there is a contrary intention. If she had intended to preserve the original power, would she have carried out that intention by creating and reserving to herself a new and distinct power? I see nothing, therefore, to lead me to the conclusion that there was any such intention, even if she had a right to do it.

But there is another argument against the continued existence of the original power: the argument may, I think, be drawn, from applying the elementary rules of regarding the uses executed as if they had been embodied in the original deed. Suppose the deed creating the power had reserved no power of revocation; then the power in the deed of 1830 must be substituted for the uses limited in the original power; and then the original power will be exhausted. Surely, if that was the effect of the deed of 1794, if no power of revocation had been reserved in it, the addition of that power cannot alter the case. If, then, the mere reservation of powers of revocation and new appointment cannot prevent the appointment in fee from putting an end to the original powers, the next consideration is, whether the exercise of these powers of revocation have the effect of restoring the original power.

Now, Lord St. Leonards has not addressed himself, in his work on Powers, to this exact question, but he has discussed this—if a power of revocation only be reserved, without an express power of new appointment, and the power of revocation be exercised, can a new appointment be made? And his opinion, which I mention, though

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it does not govern the case, is this: — If, in an original settlement, a power of revocation only be reserved, a power of appointment will be implied; but if, in a deed executing a power, no power of new appointment be reserved, none will be implied. 1 Sugd. Pow. 462. He draws this distinction.

The views of Mr. Preston on these points, as stated in his Treatise on Abstracts, differ widely. He is of opinion that a power of appointment would never be implied; but if a power of revocation were reserved, the execution would, in every case, have the effect of reviving the original uses. He seems to consider, that, even where the power of appointment is expressly reserved, no appointment could then be made under the original power — a proposition which seems quite untenable. It seems to me that the views of Mr. Preston, whether right or wrong, are propounded with very little regard to the decided cases; and, on the other hand, it may be thought that Lord St. Leonards has labored to reconcile decided cases, which it is impossible to reconcile without establishing distinctions not reconcilable with general principles. But the discussion proceeds entirely upon the assumption that the power of revocation is reserved, without a power of new appointment.

But here there is an express power of new appointment reserved by the deed of 1830. Now, both of these powers were simultaneously exercised by the deed of 1833, reserving again fresh powers; and I must now consider whether the exercise of these powers will revive the original powers. I cannot conceive upon what ground it is suggested that the execution of the deed of 1833 would revive the original power in the settlement. It appears to me clear, that the only effect of the deed of 1833 was to substitute the uses and powers of revocation and new appointment limited in that deed for the uses and powers of revocation and new appointment in the deed of 1830. There is, however, a clear distinction between the deeds of 1830 and 1833; that is to say, the former was executed in exercise of what Lord St. Leonards calls the primary power — that is, one preceding the limitation of uses; whereas the latter deed was executed in exercise of the power of revocation and new appointment following the uses limited; and therefore, even if a power of revocation alone was reserved in the deed of 1830, the execution of that alone would not revive the power of 1794, and, *a fortiori*, not where a power of new appointment was reserved. It appears to me, therefore, that the deed of 1830 had the effect neither of keeping alive the original powers, nor had the exercise of this new power the effect of reviving and restoring those powers.

Now, I come to the deed of 1835, which simply repeats the process of the deed of 1833, revoking the former uses, and appointing new uses amounting to a fee, with a fresh reservation of powers of revocation and new appointment; and therefore all the objections as to the deed of 1833 apply to the deed of 1835, with this addition; the objection as to each of these two deeds is, that although by each of them Anne Evans exercised simultaneously the powers of revocation and new appointment reserved by the next preceding deed, it was

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not necessary to do so, and she might have exercised them by two different deeds. She might by one deed have exercised only the power of revocation, without the power of new appointment; and then what would have been the effect? The power of appointment would have remained subsisting, and capable of taking effect at any time, and it would have taken effect in exercise of the last mentioned power, and not in execution of the original power in the settlement.

That brings me to the last deed, because by it she did exactly what I have been suggesting. She exercised the power of revocation without exercising the power of new appointment. But she did not, by exercising that power of revocation, destroy that power of new appointment; on the contrary, that power still continued to exist, and might have been executed by her at any subsequent period; and, of course, if that had authorized her to appoint by deed or will, she might have exercised it either by deed or will, but she reserved a power to be exercised only by deed, and not by will. Down to the time of her death she continued in a capacity to exercise the power of that deed of 1835, and her omission to exercise that power could not call into existence the powers of the original deed, which had been at an end ever since the deed of 1830; and from the time of the execution of the deed of 1835, the general power of appointment reserved by that deed was a valid and subsisting power, and lasted down to the time of the execution of the deed of 1836, and the original power had ceased; and I cannot conceive how the extinguishment of the power reserved by the deed of 1835, could call into effect a non-existing power. My opinion is, that from the time of the execution of the deed of 1830 the original power was at an end, and was incapable of being exercised, and that the will of Anne Evans was entirely inoperative. I desire it to be understood that I have had in view exclusively general powers; special and limited powers stand on a different footing, and have not been in my contemplation.

Declare that the appointment purporting to be made by Anne Evans in her will or testamentary paper is not a good and valid disposition of the estate comprised in the indenture of 1794. The plaintiffs to pay the costs of the purchasers; the costs of the other parties, by arrangement, to come out of the back rents. The balance of the rents to be paid to the defendant Saunders.

*In re THE TRUSTEE RELIEF ACT, and in re OVERHILL'S TRUSTS.*¹

February 12 and 18, 1853.

Bequest to Children, not including Illegitimate Children — Evidence.

Bequest of stock upon trust to pay the dividends to one for life, and then to divide the capital equally "between all the children of G., and the children of M., the wife of W. B., who should be alive at the respective deaths of the said G. and M." M. was married at the date of the will; she died after the testatrix without lawful issue, but leaving several illegitimate children, all born before the date of the will, and whom the testatrix believed to be legitimate. The court admitted evidence of all facts in the testatrix's knowledge at the time she made her will; but upon the result of this evidence, there being a possibility that M. might have had legitimate children after the date of the will, and there being nothing on the face of the will to confine the description to the illegitimate children who were in existence at the date of it: —

Held, that the illegitimate children took nothing.

The court will not presume that a married woman aged forty-nine is past childbearing.

MARY OVERHILL, by her will, dated the 22d November, 1834, bequeathed the sum of 625*l.* consols, to trustees, upon trust to pay the dividends to William Garratt for life, and after his decease to divide the capital "between all the children of the said William Garratt, and the children of Mary, the wife of William Bentley, of Tottenham, in the county of Middlesex, laborer, who should be alive at the respective deaths of the said William Garratt and Mary Bentley, except Mary Oakman Mullens, (who was a daughter of William Garratt,) and the issue then living of all such of their respective children, except as aforesaid, who might happen to die in their respective lives-time, leaving issue, equally to be divided between such children and issue, share and share alike, the issue of every deceased child to take only the share which his or her parents would, if living, have been entitled to." The testatrix died in 1837. William Garratt died in 1841, leaving children. Mary Bentley died in July, 1852, without lawful issue. In May, 1848, the trustees of the will transferred the stock into the name of the Accountant-General, to an account entitled "In the Matter of the Trusts of the Will of Mary Overhill," under the act for the relief of trustees. The present petition was by the children of William Garratt, praying for the transfer of the fund to them. It appeared that in January, 1832, William Bentley intermarried with Mary Bentley, who was then a spinster, named Mary Garratt. There was no issue of that marriage. Mary Garratt had six illegitimate children, all born before the date of the will, the youngest being born in 1826. These illegitimate children now claimed to share in the fund. Evidence by affidavit of William Bentley was offered, on their behalf, to prove that Mary Bentley, then Mary Garratt, had cohabited with William Bentley for eighteen years prior to their mar-

¹ 17 Jur. 342; 22 Law J. Rep. (N. S.) Chanc. 485.

riage, and that it was generally believed during that time that they were married; that the six illegitimate children were the "issue of such cohabitation," and were well known to the testatrix, who "always expressed a strong interest in them," and often "her intention of providing by her will for" them. It was also stated, that at the date of the will Mary Bentley was forty-nine years of age.

Shapter, for the petition, objected to this evidence as inadmissible, because there was no latent ambiguity in the will raised by applying it to the facts of the case, and there was nothing in the will itself to show that the testatrix had used the word "children" to designate illegitimate children. Where the latter circumstance occurred, there was certainly authority to prove that a gift by the same will to children generally might include illegitimate children. *James v. Smith*, 14 Sim. 214; *Evans v. Davies*, 7 Hare, 498; *Owen v. Bryant*, 16 Jur. 377; s. c. 13 Eng. Rep. 217. In the last case Lord Cranworth (then Lord Justice) said, "*Prima facie* the word 'children' means legitimate children, and is to be read as if the word 'legitimate' were annexed. Therefore, where a will purports to give a benefit amongst children, it is the same thing as if it had said amongst legitimate children, unless something is disclosed on the face of the will which shows that that is not meant." Here there was nothing in the will to give the word "children" any other than its first meaning. Neither was there any thing in the circumstances of the case, because Mary Bentley might have had legitimate children after the date of the will, and consequently the evidence offered was inadmissible. He cited also *Gill v. Shelley*, 1 Russ. & M. 336; *Bagley v. Mollard*, Id. 581, and *Durrant v. Friend*, 16 Jur. 709; s. c. 11 Eng. Rep. 2.

H. Stephens, for the respondents, argued, that, as in this case there actually were no legitimate children of Mary Bentley at the date of the will, and as, from the age of Mary Bentley, there was no probability, if indeed there was a possibility, of any future children being born, there arose a latent ambiguity on applying the words of the gift to the facts; and that therefore the evidence offered for the respondents was admissible, and entitled the illegitimate children to shares under the gift. He cited *Beachcroft v. Beachcroft*, 1 Mad. 430, and *Fraser v. Piggot*, 1 Younge, 354.

STUART, V. C., refused to receive the evidence offered, and holding that the illegitimate children had no claim, granted the prayer of the petition.

February 18. On this day the Vice-Chancellor having expressed a desire to have the matter again argued,

Shapter, for the petition. The word "children" in a gift means legitimate children *prima facie*, and no others can claim unless the testator has himself described them in his will as children, or unless there were not, nor could be at the date of the will, any person or

In re Overhill's Trusts.

persons to answer the description of children, except illegitimate children.

[STUART, V. C. Is the evidence here offered receivable?]

The only case in which extrinsic evidence can be looked at is where there are two or more subjects to which the words are indifferently applicable. Here there was nothing in the words of the will to point to illegitimate children, nor any circumstance in the facts necessary to be regarded which could raise any ambiguity, unless it were the age of the mother.

[STUART, V. C. You need not trouble yourself about that part of the evidence.]

Therefore any evidence concerning the illegitimate children was unnecessary and improper. But even if the evidence were received, the children could not be entitled. *Beachcroft v. Beachcroft* (*ubi sup.*) was a case in which a father, making his will, referred to his own children; and this, coupled with the allusion to the mother, was considered to be a description of existing children; and as there were no lawful issue, evidence of the existence of persons reputed to bear that character was necessarily receivable. If there is no such description in the will to entitle the illegitimate children there must be an impossibility, from the circumstances of the case, of the words being satisfied, at or after the date of the will, by legitimate children; otherwise, however plain the intention, they cannot take. *Harris v. Lloyd*, Turn. & R. 311.

[STUART, V. C. Have you any case in which the description was of the children of a woman who had only illegitimate children.]

Yes; *Durrant v. Friend*, (*ubi sup.*) where the gift was to the first born son of a woman who had an illegitimate son, her only child, known to and maintained by the testator; but Sir J. Parker, V. C., held that this son could not take, because the words were strictly applicable to a legitimate son, who might afterwards be born. He cited also *Godfrey v. Harris*, 6 Ves. 43; *Warner v. Warner*, 15 Jur. 141; s. c. 2 Eng. Rep. 68; *In re Davenport's Trusts*, 17 Jur. 314; s. c. *ante*, 293; *Meredith v. Parr*, 2 Y. & C. C. C. 525; and *Owen v. Bryant*, 16 Jur. 877; s. c. 13 Eng. Rep. 217. In all these cases the illegitimacy of the children was known to the testator, except *In re Davenport's Trusts*; but the fact of the testatrix being ignorant of it in the present instance would alone be sufficient to invalidate the

¹ It may be convenient to give a reference to some of the cases in which the court has presumed, from the age of the parents, that the birth of children was impossible:—Women presumed past childbearing at sixty-nine, *Levy v. Hodges*, Jac. 586; sixty-eight, *Miles v. Knight*, 12 Jur. 666; sixty-six, *Brown v. Pringle*, 4 Hare, 124; sixty-five, *Dodd v. Wake*, 5 De G. & S. 228; s. c. 11 Eng. Rep. 6; sixty-three, *Brandon v. Woodthorpe*, 10 Beav. 463. But in *Fraser v. Fraser*, Jac. 586, note, the court required recognizances to refund, to provide against the contingency of a woman aged fifty-five having children; and Co. Litt. 40. b., states as a fact that a woman aged sixty bore a child. The present case is an authority that the court will not presume that a married woman aged forty-nine cannot have children. The court will not make this presumption against a man. See accordingly, where a man was aged eighty, *Trevor v. Trevor*, 2 My. & K. 677. So, where the age was ninety-five, *Lushington v. Boldero*, 15 Beav. 1.

bequest, for *non constat* that the testatrix would have given her property to bastards. *Kennell v. Abbott*, 4 Ves. 802.

H. Stevens, for the respondents. Where legitimate children come into competition with bastards, the case is different; but here there are no legitimate children, and if the others are not entitled, the bequest to children of Mary Bentley must altogether fail — a consequence which the court will struggle to avoid. *Fraser v. Piggott*, (*ubi sup.*) was a case which went quite as far as the court would do now if it held these children entitled. Moreover, here the fact, that the testatrix believed these children legitimate, showed not only that she intended them, but made the description sufficient. According to her knowledge, the testatrix had used the most proper and apt words to describe the children. Then as to the age of the mother; if not impossible it was very improbable that she should have children after the date of the will; and that was a circumstance which went to prove that the words must be read as referring to existing children.

STUART, V. C. When this case was last before me, I decided it upon the ground that the evidence tendered on the part of those who claim was not receivable, and I held that the illegitimate children were not entitled on the true construction of this will, and could not have the benefit of that bequest which it is suggested was intended for them. Now, upon further consideration, and after referring to the cases, I think that, upon the words of this will, consistently with the true principle in questions of this kind, I am bound to receive all such evidence, and to look at every thing that will give me an opportunity of knowing all that the testatrix could know at the time she made her will, so as to enable the court, in construing it, to put itself in the position of the testatrix, and to construe her language with that assistance. To that extent my opinion now varies from what I before expressed. But even with the assistance of the evidence in this case, it unfortunately happens that the rule of law is too strong for the success of this claim. That is established on the highest authorities, but not upon a perfect uniformity of decision; for I think that if *Beachcroft v. Beachcroft* was properly decided, and if I could look at what was done by Sir Thomas Plumer in that case, I should be bound to hold that these children were entitled. I do not think that the doctrine laid down by Sir Thomas Plumer in that case is reconcilable with other decisions, or with the principle of them. It is entirely contradicted by *Harris v. Lloyd*, (*ubi sup.*) The principle of Sir Thomas Plumer's decision was, that by the description of "children," present children must be meant; for he said that it was unreasonable to suppose that a man, sitting down to make his will, intending a bounty to the children of an individual, should not have in his mind some present persons to fill that character. No doubt, in a later part of his judgment, he refers to the gift to the mother of the children; but in his language in p. 444, he says distinctly, after saying that the words "my children" imported such as the testator then had, "For all these reasons I think it is a gift to present children."

 Reeves v. Hodson.

Then he goes on to advert to the expressions. This is not the first occasion on which that decision has been commented upon as inconsistent with principle and authority. It is fortified by another authority quite as strong, but one which I fear I cannot follow. *Fraser v. Piggott* is quite consistent with *Beachcroft v. Beachcroft*, and rather extends than confines the principle of that decision.

But what I am bound to follow is that well-established doctrine, that if there is a gift to children as a class, unless there are words of clear description to make the class apply to illegitimate children, or, on the other hand, that the will clearly excludes any but those designated by the testator on the true construction of the words, I must hold that the description must include legitimate children only. Now, the only circumstances, to create any doubt here, were the age of Mary Bentley, at the date of the will, and the circumstances under which the testatrix made her will; that she knew that Mary Bentley had children, and believed her to be the wife of the individual whom she mentions as her husband. All that supports the view taken by Sir Thomas Plumer and Lord Lyndhurst in favor of the illegitimate children, but is quite contradicted by the view of Lord Eldon in *Harris v. Lloyd*, and in all the cases except *Beachcroft v. Beachcroft* and *Fraser v. Piggott*; for it is impossible not to see that this lady might have had legitimate children, and that they could not have been excluded from the benefit of this gift. However improbable the contingency, if there had been legitimate children of Mary Bentley, they undoubtedly would have taken. According to the argument in favor of the only children which she had, they would have been entitled to take with the others, and under the same description. That is forbidden by the rule of law; and therefore, with great regret, I must hold that they are not entitled under this bequest.

 REEVES v. HODSON.¹

April 21, 1853.

Evidence — Witness.

Terms on which a witness will be allowed to be examined and cross-examined, after having been already examined *de bene esse*, in anticipation of a trial in which the record had been withdrawn at the last assizes.

L. WIGRAM, and C. Hall, moved, on behalf of the defendant, that an issue which had been directed to be tried at the last assizes (but which had not been tried, the record having been withdrawn at the last moment) might be taken *pro confesso*.

¹ 17 Jur. 344.

Reeves v. Hodson.

Rolt and *Shapter* urged the hardship of such a course. The record had been withdrawn because an important witness, Mr. Serg. Storks, had been unable to attend, owing to his being engaged in his judicial functions in London, as a judge of the County Court of Shoreditch. They cited *Hargrave v. Hargrave*, 12 Beav. 408.

Wigram said that the depositions *de bene esse*, as taken, were inaccurate, and had been so stated to be by the witness; and that, therefore, it was important to them, that if these depositions were to be made use of, the defendant should have an opportunity of rectifying this misstatement by a cross-examination.

[Wood, V. C. It would be a very great extension of what Lord Langdale says in *Hargrave v. Hargrave*, if I were to hold that you, Mr. Wigram, are to have a chance of restating what is not stated so favorably for you as it might be.]

There may be great objections to examining a witness repeatedly, but the same objection does not hold to cross-examination. All we ask is to be placed as nearly as possible in the same position as if the trial had taken place in March. We point out a specific objection to the depositions as taken down by the examiner, namely, that they do not correctly state what the witness intended to state. The inconvenience, if any, which will be caused, has been occasioned by the plaintiffs' own delay. I do not mention this as matter of consent, but as a term to be introduced by the court in the order, if it shall think fit to make an order, namely, that I shall have an opportunity to cross-examine the witness.

Wood, V. C. I feel very great difficulty in making this order. There is a very great inconvenience in these repeated examinations of a witness as to the same matter; but I think, on the whole, Mr. Wigram, your view is nearly the correct one. If this trial had taken place in March, Mr. Serg. Storks's evidence could not have been read. He must have been produced, and you would have had an opportunity of cross-examining him. It is not your fault that he was not there; and therefore you may be placed under the disadvantage of having the depositions read without cross-examining the witness. Then it is important that you should have an opportunity of cross-examining, in order to reform, not a misstatement by the witness, but an erroneous taking down of what the witness said. The proper order will be a peremptory order for them to proceed to trial next assizes, so that the bill may be taken *pro confesso* in case they do not do so; they to pay such costs as they would have had to pay at law in case the record had been withdrawn in an ordinary action, and the costs of this application; the defendant to be at liberty to cross-examine Mr. Serg. Storks, and give notice of his intention to do so, and in that case the plaintiffs are then to be at liberty to examine him.

Bartley v. Bartley.

BARTLEY V. BARTLEY.¹

November 2 and 23, 1853.

Production of Documents — Co-Defendant and Agent.

Under an order that one of the defendants should allow the plaintiffs, their solicitors or agents, to inspect certain documents, it was held that the defendant was justified in refusing to allow the inspection to take place in the presence of a co-defendant, although employed as an agent of the plaintiffs.

AN order was made in this cause on the 26th of May, 1852, that the plaintiffs, their solicitors or agents, should be at liberty to inspect and peruse at the house of the defendant, George William Bartley, the several books and papers belonging to George Bartley deceased, which were in the possession of the said defendant; and it was ordered that the plaintiffs, their solicitors or agents, should be at liberty to take copies thereof, and abstracts or extracts therefrom, as they should be advised. In pursuance of this order, the plaintiffs' solicitors attended at the house of the defendant, George William Bartley, for the purpose of examining the books and papers, and the defendant, Robert Bartley also attended to assist in examining such books and papers; but the solicitors for the defendant, George William Bartley, refused to allow the inspection to take place in the presence of Robert Bartley.

It was now moved, on behalf of the plaintiffs, that the defendant, George William Bartley, might be ordered within seven days to produce and leave with the Clerk of Records and Writs the several books and papers belonging to George Bartley deceased, and which by the order of the 26th of May the plaintiffs, their solicitors or agents, were to be at liberty to inspect and peruse.

Kenyon Parker, in support of the motion, contended that the defendant, George William Bartley, had no right, under the order already made, to prevent Robert Bartley from being present at the inspection of the documents, as the agent of the plaintiffs; that Mr. Robert Bartley was a person well acquainted with the documents in question and better able than any one else to select the requisite papers; that it had always been the practice in the office of the Clerks of Records and Writs to allow a co-defendant to assist in the examination, but as the order for inspection included the solicitors or agents of the plaintiffs, Mr. Robert Bartley had full right to be present as an agent if not as a co-defendant.

Hinde Palmer opposed the motion, and submitted that the plaintiffs or their solicitors had no power, without an express order of the

¹ 22 Law J. Rep. (N. S.) Chanc. 47; 16 Jur. 1062; 1 Drewry, 233.

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court, to take a co-defendant to the house of the defendant, George William Bartley, in order to be present at the examination of the books and papers if such defendant were objected to; the word "agents" in the order only referred to agents of the solicitors. The defendant had no wish to prevent a full inspection of the documents, but as he had a particular objection to Mr. Robert Bartley being present he would not consent without an order of the court to that effect.

The VICE-CHANCELLOR reserved his judgment.

November 23. . KINDERSLEY, V. C. This is a motion for production of documents at the office of the Clerk of Records and Writs. There had been a previous order by arrangement, the effect of which was that the documents were ordered to be produced by the defendant, George William Bartley, at his house, for the inspection of the plaintiffs, their solicitors or agents. This motion is founded on an allegation by the plaintiffs that they have not had the full benefit of the former order by reason of the conduct of the defendant, George W. Bartley, which was this: that he refused to allow the plaintiffs' solicitors to inspect the documents when accompanied by another defendant, Robert Bartley, who he alleged had no right to inspect them.

The plaintiffs insisted that under the order for production the documents were to be inspected by them, their solicitors or agents, and that if they chose to treat the defendant, Robert Bartley, as their agent, they had a right to do so. Now, the question is whether the plaintiffs have the power to constitute the defendant, Robert Bartley, their agent for the purpose of inspecting the documents under the previous order. I consider it rests upon what is the practice in the office of the Clerks of Records and Writs, for it was contended that had the papers been ordered to be produced in the usual way at the office of the Clerks of Records and Writs, the plaintiffs might then have taken the other defendant to assist in the examination.

Now I find, upon inquiry, that such a course would not have been allowed if the defendant who was ordered to produce such documents had raised an objection. Why, then, should there be a better right when the papers are in the hands of a particular defendant and are ordered to be produced at his house? I do not see why this should be allowed. I can understand there might arise a case in which the plaintiffs might say, "the matter is so peculiar that we must have the assistance of a particular defendant," but then they must apply to the court for a special order on special grounds. I think, therefore, the defendant, George William Bartley, was justified in refusing to allow Robert Bartley to be present at the inspection, and that there has been no impediment placed in the way to prevent the plaintiffs, their solicitors or agents, from having a proper inspection. Beyond that objection there has been the fullest permission given in carrying out the order of the court. The motion must be refused, with costs.

 Shortridge v. Bosanquet.

SHORTRIDGE v. BOSANQUET.¹

March 31; April 1, 2, 16, 19, and 20, 1852.

Joint-Stock Company — Power of Directors — Shareholder — Transfer of Shares — Share Register List — Evidence — Creditor of Company — Action by Sci. Fa. against Shareholder — Injunction.

R. S., a shareholder in a joint-stock banking company, sold his shares, and gave notice of it to the company; and upon an application by the purchaser, he received a certificate with the signature of three directors that his name had been entered on the share register list. Under the Joint-Stock Companies Banking Act, 7 Geo. 4. c. 46, s. 8, the company made a return to the Stamp Office stating that R. S., the vendor, had ceased to be a shareholder. The bank subsequently suspended payment, and upon a call being made, the purchaser of the shares neglected to pay it, in consequence of inability. The bank then made an entry in the share register list, stating that the transfer was invalid for want of the consent of a board of directors duly constituted, and they made a fresh return to the Stamp Office, in which they inserted the name of R. S. as a shareholder. A writ of *scire facias*, at the instance of the bank, was then issued by a creditor of the company against R. S., upon a judgment obtained against the company, and a verdict was obtained against R. S. on the ground that the transfers were invalid for want of strict compliance with the company's deed:—

Held, upon a bill filed by R. S., that he was not bound to inquire whether the provisions of the deed had been observed, and that he had ceased to be a shareholder; that after the name of R. S. had been removed from the books, the directors had no power, under the clauses of the deed, to again introduce his name; that as the *scire facias* was issued by the creditor at the instance of the company for their own purposes, they must pay the costs, and an injunction was granted to restrain the levying of execution upon the judgment.

THIS suit was instituted by Richard Shortridge against Henry Bosanquet, the public officer of the London and Westminster Bank, and against Joseph Mather, the public officer of the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company, and others, to compel the latter bank to strike the plaintiff's name out of their books as a shareholder in that bank, and also to restrain the London and Westminster Bank from further prosecuting an action at law which they had brought through H. Bosanquet, as their public officer, against the plaintiff, as a shareholder in the Newcastle Union Bank, to recover a large balance due from the Newcastle Union Bank to the London and Westminster Bank, in which action they had obtained judgment. The bill stated the formation of the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company under a deed dated the 1st of October, 1836, which, amongst others, contained the following provisions, namely:—

83. "That the board of directors shall cause to be delivered to every person executing these presents, and every person approved by the board as fit to be a holder of any shares in the capital of the company, and at the expense of such person or of the company, at the option of the board, after the entry of his or her name and place of residence in the share register book as the holder of such shares, one or more certi-

¹ 22 Law J. Rep. (N. S.) Chanc. 48; 16 Jur. 919.

Shortridge v. Bosanquet.

ficate or certificates of the shares in respect of which he or she is or may become a shareholder, signed by three of the directors, specifying the numbers of the shares, and the name and residence of such shareholder, and that such shares stand in his or her name in the share register book as the holder thereof; and shall, if required so to do, cause to be delivered to every person, at his or her expense, or at the expense of the company, at the option of the board, on his or her ceasing to hold any share or shares comprised in one certificate with any share or shares that may be retained by him or her, one or more new certificate or certificates of the shares retained, signed by three directors, specifying the numbers of the shares retained and the name and residence of the person retaining the same, and that such shares stand in his or her name in the share register book as the holder thereof; but no shareholder requiring more than one certificate shall be entitled to duplicate certificates of any shares; and in the cases hereinafter mentioned, the board of directors shall, upon the delivery of such certificate, or each of the said certificates, to a shareholder as aforesaid, take from every shareholder one or more receipt or receipts, under his or her hand, for such certificate or certificates, in such form as the board shall prescribe."

84. "That the board of directors shall cause the name and place of residence of every person for the time being entitled to be registered as the holder of any shares, and the proper number of each share, to be entered in a book to be kept for that purpose, to be called 'The Share Register Book,' and shall, upon receiving at the banking-house in Newcastle-upon-Tyne notice in writing of a shareholder having changed his or her name or place of residence, and of his or her new name and place of residence, cause his or her new name and place of residence to be entered in such book, and substituted for the former name and place of residence."

85. "That the board of directors shall alone have the power to make any entry, erasure, or alteration in the share register book, and the same shall be kept at the banking-house of the company in Newcastle-upon-Tyne, and shall not be inspected without the permission of the board."

138. "That every person for the time being entitled to any shares in the capital of the company shall, subject always and without prejudice to the several agreements and provisions contained in the said indenture, be entitled to be registered as the holder thereof, or to dispose of the same."

139. "That every person applying to be registered as the holder of any shares, or to dispose thereof, shall, if thereunto required, prove his or her title to the satisfaction of the board of directors."

144. "That no person shall become or be registered as a shareholder without the consent of the board of directors, who may, on the application of any shareholder or other person entitled to dispose of any shares, testify the same by a certificate in writing, signed by three of the directors, which may be in the form following: —

'This is to certify that we, the undersigned, three of the directors of the Newcastle, Shields, and Sunderland Union Joint-Stock Bank-

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ing Company, upon the application, [name and description of person or persons making the application,] testified by his or their signing his or their name or names in the margin of these presents, consent that the shares numbered — respectively, in the capital of the company, shall be transferred to [name and description and place of abode of proposed shareholder,] and that the name of the said — be entered in the share register book of the company as the holder of such shares.

‘ Dated this — day of —.

‘ — { Three of the directors of the Newcastle,
‘ — { Shields, and Sunderland Union Joint-
‘ — { Stock Banking Company.’ ”

146. “ That after such certificate of consent shall be duly signed, and after the proposed shareholder named therein shall have executed such deed of covenant, or have given such receipt as is hereinafter required on the acquisition of shares, it shall be lawful for the person or persons applying for such certificate of consent, or for the proposed shareholder, named therein, to require that the name of the proposed shareholder shall be entered in the share register book as the holder of the shares mentioned in such certificate; and after the name of the proposed shareholder shall be entered in the share register book, the former holder or owner of the shares mentioned in such certificate, and all persons claiming by, from, or under him or her, except the proposed shareholder, shall not, so far as regards the same shares, have any claim or demand whatsoever, either upon or against the company, or the capital stock or effects thereof, for or on account or in anywise relating to such shares, and shall be free and discharged of and from all covenants, agreements, and provisions in these presents contained in respect of such shares.”

147. “ That every such certificate of consent shall be deposited with, and remain in the custody of, the board of directors; and that in case the board of directors shall refuse their consent to any transfer of shares, they shall, on the request of the holders thereof, or other person entitled thereto, be obliged to purchase the same, which they are hereby authorized to do, out of the funds or on behalf of the company, at a price or sum per share to be fixed by the average of the prices or sums given on the ten next preceding sales of shares.”

156. “ That every entry, erasure, or other alteration which, upon the taking, purchase, or acquisition of any shares in the capital of the company, shall have been made by the board of directors in the share register book, shall, as between the company and the last holder or holders of such shares, and all persons claiming by, from or under him, her, or them, be binding and conclusive on such last shareholder or shareholders, and all persons claiming by from, or under him, her, or them; and he, she, or they shall not be at liberty to dispute or call into question the validity of such entry, erasure, or other alteration, nor for the purpose of disputing or calling in question the validity of such entry, erasure or other alteration, to inquire whether all the rules and regulations, by these presents required to be observed and attended to previously to the making of such entry, erasure, or other alteration, have been duly observed and attended to or not; but if such rules

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and regulations shall not have been duly observed and attended to, the last holder or holders of such shares, or any person or persons claiming by, from, or under him, her, or them, may maintain any action or suit to which he, she, or they may be entitled, against any person or persons, for any act, neglect, or default through or by reason of which such entry, erasure, or other alteration may have been improperly made: provided nevertheless, that no action or suit shall be commenced against any director or other officer of the company, for any such act, neglect or default, after the expiration of two years from the time when such entry, erasure, or other alteration shall have been made."

157. "That previously to the entry in the share register book of the company of the name or names of any person or persons as a new holder or holders of any shares in the capital of the company, it shall not be necessary for the board of directors to inquire whether such shares have been effectually vested in such person or persons or not, it being the intent that if the name of any person shall have been improperly registered in the share register book as the holder of any shares, such person shall, as between him and her, and the shareholders for the time being of the company, be a shareholder of the company to all purposes in respect of such shares, and all claims which the last holder of such shares, or any person or persons claiming by, from, or under him or her, may have on the same, shall be made wholly and exclusively upon or against the new holder of such shares, or his or her executors or administrators."

158. "That the share register book shall, as between the company and every person claiming to be a shareholder in respect of any shares, be conclusive evidence on behalf of the company to show whether he or she was a shareholder in the company in respect of such shares."

159. "That the certificate or certificates to be delivered by the board of directors to every present and future holder of shares in the capital of the company, shall, as between the company and such shareholder, be conclusive evidence on behalf of such shareholder that he or she was a shareholder of the company in respect of the shares mentioned in such certificate or certificates; and such certificate shall continue to be such conclusive evidence until such entry, erasure, or other alteration as in these presents is mentioned shall have been made by the board of directors in the share register book for the purpose of making it appear therein that the holder of the shares mentioned in such certificate or certificates was no longer entitled to such shares."

162. "That none of the shareholders, other than the duly appointed officers of the company in the execution of their respective offices, shall be at liberty to examine or inspect any of the books, papers, accounts, or other muniments or documents of the company, or in any way to interfere or intermeddle with the affairs and concerns thereof, otherwise than as they are expressly authorized to do by these presents."

In January, 1837, the plaintiff became a shareholder in the bank

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and received a certificate, in pursuance of the 83d clause of the deed, of his being the registered owner of 200 shares; the plaintiff afterwards purchased other shares in the bank, and in the month of July, 1847, was the holder of 620 shares. About that time the plaintiff employed Mr. Glover, a share-broker in South Shields, to dispose of his shares for him, and accordingly the whole 620 were sold to various parties, at different times between the 7th of July and the 28th of August, 1847, when the last of such sales was completed. Upon these sales the plaintiff sent in to the bank the usual notices of his intention to transfer the shares.

No consent of a board of directors, in pursuance of the 144th clause, to the purchasers becoming owners of the shares purchased by them, was ever given, but certificates signed by three directors, though not in all cases acting as a board, were given to the different purchasers and the transfers of all the plaintiff's shares to the different parties were entered in the share register book of the company. Some of the purchasers were previously shareholders in the company, others not. All of such purchasers, however, after such transfers, received the dividends in respect of the shares transferred to them; all notices in respect of these transferred shares were sent to them, and all calls with the exceptions hereinafter mentioned, in respect of the shares so transferred, were, after such transfers, paid by the purchasers respectively.

The half-yearly meeting of the company took place on the 27th of July, 1847, at which meeting the report of the directors recommending a half-yearly dividend of 10*l.* per cent. to be declared up to the 30th of June, 1847, and to be payable on the 3d of August, was adopted, and such dividend was paid accordingly. On the 8th of October, 1847, the banking company, in pursuance of the provisions of the Joint-Stock Company's Banking Act, the 7 Geo. 4, c. 46, s. 8, made a return to the Stamp Office of such persons as had ceased to be members of the copartnership, in which the name of the plaintiff was returned as a party who had ceased to be a member of the copartnership.

The bank continued to carry on business until the 21st of October, 1847, when it stopped payment, and on the following day a printed circular was issued, signed by the general director of the company, calling a general meeting of the shareholders on the 29th of the same month. This circular was not sent to the plaintiff, but it was sent to the persons who had been registered as the transferees of his shares. A meeting was accordingly held on the 29th of October, 1847, when a call of 5*l.* per share was resolved on, and was ordered to be paid by the registered shareholders of the company. This call was paid by all the persons who purchased shares of the plaintiff except three, names respectively George Pringle Thew, Andrew Millar, and William Johnstone, Mr. Thew having purchased 200 of the shares, Mr. Millar forty, and Mr. Johnstone twenty-five. Mr. Thew, previously to his purchasing the plaintiff's shares, was a shareholder in the company, but Mr. Millar was not. A circular notice was thereupon sent to all the persons who had not paid this call, (and,

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amongst others, to Mr. Thew and Mr. Millar,) calling upon them for payment.

After the bank stopped payment, general meetings of the shareholders were held, and plans were proposed to form arrangements for carrying on the company; all these meetings were convened by circular letters; but the plaintiff never received any summons, nor was he called upon for any of the calls, and the plaintiff received no intimation whatever of the company disputing the validity of the transfer of any of his shares until the 9th of January, 1848, when he received the following letter:—

“Union Bank, Newcastle-upon-Tyne, January 8th, 1848.

“DEAR SIR:—The directors of the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company feel it right to inform you that they will not allow the transfer of 200 of your shares in the bank, to Mr. G. P. Thew, nor of forty of your shares to Mr. Andrew Millar, for want of the proper assent on the part of the board of directors to the sale and transfer of those shares in the manner prescribed by the deed of settlement, and that they will look to you for payment of the calls on those shares. A call of 5*l.* a share has already been made, which was due on the 15th of December last.

“I am, dear Sir, yours faithfully,

WM. WOODS,

“Chairman of the Committee.”

The plaintiff wrote to William Woods on the same day:—“You will find that the transfer of these shares is not only allowed and recorded in the books of the bank, but that such transfer is further confirmed by your own application to Mr. Thew and Mr. Millar for their calls upon these shares as the holders of them. Had the objection to the transfer been taken at the time, I would then have required the directors to take the shares at the price of the day. (See section 148.)” The plaintiff refused to pay any calls on the shares, and on the 24th of January, 1848, the London and Westminster Banking Company, by Henry Bosanquet, their public officer, commenced an action of *scire facias*, in the Court of Exchequer, for the sum of 24,853*l.* 12*s.* 6*d.* *Bosanquet v. Shortridge*, 4 Exch. Rep. 699, upon a judgment recovered by the said Henry Bosanquet against William Chapman, the public officer of the Union Bank, for 63,157*l.* 12*s.* 6*d.* and costs, and a verdict was obtained for the plaintiff in that action.

The circumstances under which this judgment was recovered against the Union Bank by the London and Westminster Bank, and the writ of *scire facias* issued against the plaintiff, were as follows:—In the month of September, 1847, the London and Westminster Banking Company opened an account with the Union Bank as their London agents and correspondents, and continued such account until the stoppage of the Union Bank on the 21st of October following; during that period the London and Westminster Bank gave credit to the Union Bank for upwards of 50,000*l.*, and, at the time of the Union Bank stopping payment, were creditors to a large amount.

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After the stoppage of the Union Bank, communications took place between the solicitors of the two banks as to the means of liquidating this debt, and on the 8th of December, 1847, Mr. Watson, the solicitor of the Union Bank, wrote to Messrs. Roy & Co., the solicitors of the London and Westminster Bank:—"Newcastle, Dec. 8, 1847. Gentlemen,—The committee of the Union Bank, finding that some wealthy shareholders have transferred their shares to parties of limited means within a few weeks of the suspension of the bank, and being desirous of compelling the payment of the calls in respect of these shares, wish their clients, the London and Westminster Bank, to obtain judgment against the Union Bank, and to register it, so as to prevent any shareholder from disposing of his property." On the 10th of December, 1847, Messrs. Roy & Co. wrote in answer—

"London, December 10, 1847.

"SIR,—We have submitted to the directors of the London and Westminster Bank your letter of the 8th instant, and we have likewise brought before the directors the state of the accounts, showing a balance of 66,000*l.* and upwards. With reference to this state of accounts the directors have instructed us to adopt legal measures forthwith, and we shall to-morrow send you a writ for your undertaking.

"Yours very obediently,

"R. & W. G. Roy."

Process was accordingly issued, and judgment for 63,157*l.* 12*s.* 6*d.* was entered up against the Newcastle Union Bank, at the suit of the London and Westminster Bank; after which communications took place between the solicitors of the two banks as to the parties to be proceeded against by writ of *scire facias*, and a list of parties against whom such writs were to be issued was on the 8th of January, 1848, forwarded by Mr. Watson to Messrs. Roy. This list included the plaintiff's name. On the 10th of January, 1848, Messrs. Roy & Co. wrote to Mr. Watson:—

"Union Bank.

"Dear Sir,—We beg to acknowledge the receipt of your letter inclosing a list of fourteen persons against whom you wish us to proceed by writs of *scire facias*. We find at Somerset House that four of the persons mentioned in your list, namely, Benjamin Bullock, Jane Thompson, John Burn, and Richard Shortridge, ceased on the 1st of October to be members of the Union Bank. It is quite clear that we must proceed in the first instance against those persons who are members at the time of issuing the writs of *scire facias*, and that the list of existing members must be exhausted before we can proceed against those who are off the list. (7 Geo. 4, c. 46, s. 8.) Let us hear from you on this point. The other writs of *scire facias* will be sent into the country for service to-morrow night.

"We are, dear Sir, yours faithfully,

"R. & W. G. Roy."

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In answer to this, Mr. Watson stated that the Union Bank were advised that the transfers in those instances were fraudulent and irregular; and on the 15th of January, 1848, Mr. Watson wrote to Messrs. Roy & Co. informing them (amongst other things) that the Union Bank were making a fresh return to the Stamp Office, in which they should place the names of the plaintiff and Mr. Bullock on the list of shareholders, and requesting Messrs. Roy to issue a *scire facias* against the plaintiff and Mr. Bullock upon the return being filed. A fresh return, including the plaintiff's name as a shareholder in the Union Bank, was accordingly made and filed; and a writ of *scire facias*, at the suit of the London and Westminster Bank, was accordingly issued against the plaintiff, and a verdict was obtained in that action for the plaintiff, with liberty for the defendant in the action to move to enter a verdict for him. A rule *nisi* for this purpose was obtained, but the court, on the argument, discharged the rule.

The plaintiff now filed his bill, stating the above circumstances, charging that the transfers of his shares had been sanctioned and approved by the company, and that they had been transferred in the same manner as all other shares of the company, and that it had never been usual or the custom to require the consent of all the directors to the transfers of shares, and that in fact the provisions of the deed in that respect had never been complied with; and praying for a declaration that the Newcastle, Shields, and Sunderland Union Joint-Stock Banking Company had accepted the transfer of all the shares of the plaintiff in the said company, and that it might be declared that the plaintiff ceased to be a member or partner in the company after the 28th of August, 1847, and that the name of the plaintiff as a shareholder or partner might be erased from the books of the company, and that the company might be restrained from inserting or continuing the name of the plaintiff as a member, partner, or shareholder in the share register book of the company, or in any other book, list, or document, and from making any return in which the name of the plaintiff should be inserted or mentioned as such member, partner, or shareholder, and from publishing or holding out, or in any manner treating or using the plaintiff as such member, partner, or shareholder; and that the Union Banking Company and the London and Westminster Banking Company might be restrained from further prosecuting the action commenced by them, and from commencing or prosecuting any other action, suit, or proceeding against the plaintiff, as a member, partner, or shareholder in the Union Banking Company after the month of August, 1847.

The common injunction having been obtained, a motion to dissolve it was refused on the plaintiff bringing the money into court.

R. Palmer, Elmsley, and Bates, for the plaintiff. At law the court held, that the plaintiff could not avail himself of the defence, that he ought not to have been returned to the Stamp Office as a shareholder, unless that he could show that a *bona fide* legal transfer had been made under the provisions of the company's deed; and that the con-

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sent of the board of directors, as required by the 144th clause, had not been obtained previous to the transfer of the plaintiff's shares; so that, at law, the court held the transfers invalid. But the rule respecting transfers has never been complied with; the transfer of shares has always been made in the manner followed by the plaintiff; and between him and the directors these transfers are not invalid: the purchasers also have been treated by the bank as the owners of the shares; they were served with notices, and calls in respect of the shares, were made upon them.

The return to the Stamp Office stated that the plaintiff had ceased to be a shareholder or member of the company, and it was only upon an assumed insolvency of the transferees that the idea of making the plaintiff liable suggested itself to the directors: but where the uniform practice of the company has been contrary to the deed of settlement, a court of equity will consider that virtually there has been an alteration in the practice sufficient as between the members of the company to bind the shareholders. *Const v. Harris*, Turn. & R. 517; and this applies to companies as well as trading partnerships. *Taylor v. Hughes*, 2 J. & Lat. 34, and in cases like the present, under the Winding-up Acts, a transferee will be considered a contributory. *In re the Vale of Neath and South Wales Brewery Company*, Walker's case, 3 De Gex & S. 149; *In re St. George's Steam Packet Company*, Maguire's case, 3 De Gex & S. 31. In several cases the formalities of these deeds have been dispensed with, or otherwise such one-sided transactions would work the greatest injustice. *The Cheltenham and Great Western Union Railway Company v. Daniel*, 2 Rail. Cas. 728; s. c. 2 Q. B. Rep. 281; *Pasley v. Freeman*, 3 Term Rep. 51; s. c. 2 Smith's Lead. Cas. 55, and *The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock*, 2 Rail. Cas. 527; s. c. 7 Mee. & W. 574. The copies of the list of shareholders returned to the Stamp Office are evidence within the 14 & 15 Vict. c. 99. The proceedings under the *scire facias* were taken by the London and Westminster Bank, but it was under the direction of the Union Banking Company who were to pay all expenses. But a creditor has no right to allow himself to be made an instrument in the hands of others to obtain circuitous remedies against the debtors of other parties. The correspondence between the solicitors of the two banks is evidence of who was the substantial plaintiff in *Bosanquet v. Shortridge*. In *Taylor v. Hughes*, a similar proceeding was considered fraudulent, and the creditor was restrained from proceeding with the action. *Lewis v. Billing*, 4 Rail. Cas. 414; *Fernihaugh v. Leader*, 4 Rail. Cas. 373; and *Cutts v. Riddell*, 1 De Gex & S. 226. The account with the London and Westminster Bank has also been continued to the present time. *In re, the Vale of Neath and South Wales Brewery Company*, White's case, 3 De Gex & S. 157; *In re, the Northern Coal Mining Company, ex parte Bagge*, 13 Beav. 162; s. c. 4 Eng. Rep. 72; *Burnes v. Pennell*, 2 H. L. Cas. 497.

Rolt, Campbell, and Hetherington, for the defendant, Henry Bosanquet, the public officer of the London and Westminster Bank. It

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has been argued that this court will interfere to restrain proceedings at law when there is no collusion between the parties; but to entitle a party sued at law to relief in equity in cases similar to the present, two points must be established: the one that the company has no right against the shareholder who is sued by the creditor; and the other that the action must be brought for the sole benefit of the company, of which the person sued is a member; so that the money must come into the pocket of the company, and not into the pocket of the creditor suing. Neither of these points exists in this case, and the right of the London and Westminster Bank is established at law, and where the legal right exists this court will not interfere with the right of the creditor against the shareholder.

It is said, that the creditor was indemnified against costs, that the company was not to have any claim at all upon the money, and that it was not to go to the bank in the shape of calls, but twenty parties are picked out from the shareholders and are pursued for the debts of the company; a court of equity has no right to interfere to prevent it, and thus by an outstanding judgment not hundreds but tens of thousands of pounds might be recovered. All the objections relied upon by the plaintiff might have induced a different conclusion if submitted to a court of law, but they afford no ground for relief in equity, and no distinction can be drawn between the liability of the plaintiff as a shareholder and his liability to the company. Both *Fernihaugh v. Leader* and *Lewis v. Billing* were decided on demurrer, and in both cases it was alleged that the debt had been assigned by the creditor to the other defendants upon paying the debt.

The London and Westminster Bank succeeded at law, because the plaintiff was a shareholder; he may have his remedy against other individuals for not having done any act to relieve him from his liabilities, but they cannot be bound by the acts of individual directors; and the formalities necessary to the validity of the transfer cannot be held to have been dispensed with, without the concurrence of every individual shareholder. *In re, the Vale of Neath and South Wales Brewery Company, Morgan's case*, 1 Mac. & G. 225; s. c. 1 Hall & Tw. 320; *In re, the Vale of Neath and South Wales Brewery Company, ex parte Lawes*, 20 Law J. Rep. (n. s.) Chanc. 295; s. c. 2 Eng. Rep. 106; 21 Law J. Rep. (n. s.) Chanc. 688; s. c. 10 Eng. Rep. 162; *In re, the North of England Joint-Stock Banking Company, ex parte Hall*, 1 Hall & Tw. 580; s. c. 1 Mac. & G. 307; and *In re, the St. George's Steam-Packet Company, Hennessy's case*, 2 Hall & Tw. 395; s. c. 2 Mac. & G. 208. In this case the banking company takes its rights and privileges from the Joint-Stock Companies Banking Act, 7 Geo. 4, c. 46, so that the shareholder transferring his shares is bound to see all the formalities of transfer complied with, and his not having done so will not enable him to say that there has been an acquiescence on the part of the company in acts never brought to their notice. *Lund v. Blanshard*, 4 Hare 9; *Ness v. Armstrong*, 3 Exch. Rep. 805.

Roupell, Lloyd, and Stevens, for the defendant, Mather, the public

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officer of the Newcastle, Shields and Sunderland Union Joint-Stock Banking Company. *In re, the St. Marylebone Banking Company, Davidson's case*, 3 De Gex & S. 21.

April 20, 1852. THE MASTER OF THE ROLLS. I entertain no doubt that the plaintiff is entitled to a decree. There are two questions. The first and main question is, whether the plaintiff is a shareholder of the Union Bank, as between himself and the Union Banking Company itself; and if he is, then there is no other question in the case. But if he is not, then the second question arises, against the London and Westminster Bank, whether the action is *bond fide* the action of the London and Westminster Bank, and whether they ought to be permitted to enforce execution upon it; or whether it is, in fact, the action of the Union Bank, and they ought to be prevented from recovering upon it.

The facts upon the first point are, that the banking company was established in the year 1836, and the plaintiff was an original shareholder in the company. In addition he purchased a considerable number of other shares, and in May, 1847, he was the owner of 620 shares. The bank seem to have paid 10l. per cent. dividend on all occasions, up to the month of June, 1847. The plaintiff thought proper to sell all his shares. I will assume that these were *bond fide* sales. He sold all the shares he had in the banking company; 200 of them he sold to Mr. Thew. In respect of 100 of these shares the sale took place, and the transfer was made in the books of the bank previously to the general meeting and the declaring of a dividend, which took place on the 27th of July, 1847.

With respect to another 100 of those shares, fifty were sold on the 6th of July, 1847, and fifty on the 13th of July, 1847. The transfers of those shares did not take place till the month of August, 1847, subsequent to the general meeting. The forty shares sold to Mr. Millar were sold on the 20th of July, 1847, and the transfer in the books took place in the month of August, 1847, subsequent to the general meeting. The relief sought is in respect of these 240 shares. No question is raised with respect to the plaintiff's remaining shares. Mr. Thew, or his agent, applied to the public officer to know if the transfer was permitted, and received a certificate of his being an owner in respect of these shares, and so did Mr. Millar, and it is proved that the transfers of these shares from the plaintiff to Mr. Thew and Mr. Millar were made in the books of the bank, in both cases; the shares were sold with the dividend of July; and in respect to 100 of the shares, it was paid to Mr. Thew; with respect to the remaining 140, it was paid to Mr. Shortridge, and paid over by him to the purchasers.

It appears also that Mr. Thew, though he was a shareholder in other respects, attended the public meetings in respect of all his shares in the concern, and Mr. Millar, who had no other shares, attended the public meeting in respect of the shares he had bought. This took place in the month of August, 1847. In July, 1847, a report was

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made speaking favorably of the concerns of the bank, and recommending a dividend of 10*l.* per cent.

After this, on the 6th of October, or in the early part of October, 1847, a return was made to the Stamp Office, which stated that the plaintiff had ceased to be a shareholder of the Union Bank, and on the 21st of October, 1847, the bank suspended its payments. Upon this state of the case steps were taken to arrange the affairs, by the directors and shareholders of the company remaining, and in December, 1847, and January, 1848, communications took place between the Union Banking Company and the London and Westminster Bank.

On the 8th of January, 1848, the Union Bank informed the plaintiff that they intended to contest the validity of the transfer of the shares to Mr. Thew and Mr. Millar; and in answer to that he writes a letter of remonstrance, stating that if they had disputed the transfer at the time, he should, under the provisions of the deed, have required the directors to purchase at the then last market price, which he was entitled to do. The Union Bank, notwithstanding, on the 14th of that month, makes an entry in the book, declaring that the entries made of the transferred shares from the plaintiff to Thew and Millar were void entries, in consequence of not having received the consent of a board of directors, and they send a return to the Stamp Office, in which they insert the name of the plaintiff as a shareholder in the concern. Then the London and Westminster Bank bring an action on the *scire facias* against the plaintiff to recover in the action against him, and it is clearly and decisively settled in the action at law that the plaintiff is liable to the London and Westminster Bank; and if the plaintiff is entitled to recover against the Union Bank, or against the London and Westminster Bank, it must be by reason of some equity flowing out of the contract which he has entered into, and not by reason of any legal rights he may have, which have been determined in the action at law.

I shall first consider how the matter would stand if the books were now before me exactly as they were on the 8th of January, 1848; and I shall then consider whether the subsequent alteration of the books will vary or alter the equity between the parties.

In the first place, I assume that the books remain unaltered, and that the name of the plaintiff appears no longer as a shareholder in the concern, but that the shares are transferred to Mr. Thew, and that also the last return to the Stamp Office omits his name as the holder of the shares. I shall afterwards consider whether what has since taken place makes any difference in that respect. It is obvious, therefore, if it is considered on that assumption, that the burden of proof lies exactly the other way in the cause to what it does in the action. In the action, *Bosanquet v. Shortridge*, the case was that of a creditor of the concern suing a shareholder, and he produced the books of the bank to show that the shareholder's name was there, and that he was, in the last return to the Stamp Office, under the Banking Act, returned as a shareholder in the concern. That was all that was necessary for him to do. It therefore threw the burden of

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proof on the defendant, Mr. Shortridge, to prove that he was not a shareholder in the Union Bank; and accordingly what he attempted to do was to show that the transfers which had been made were valid and legal transfers; and the court was of opinion that those transfers, not having been made with the consent of the board of directors, as required by the deed, were not valid and legal transfers, so as to discharge him from being a shareholder; and it is to be observed that in that case, it was a fact found by the special verdict that the transfers had been made without the consent of any such board; and Rolfe, B., in giving judgment, expressly states it as an admitted fact between the parties.

In the assumed case I was taking, the plaintiff's name does not appear in the books, or in the list returned to the Stamp Office, and therefore the burden of proof lies upon the Union Bank. I am now throwing entirely out of consideration any question of the London and Westminster Bank; it lies upon the Union Bank to show, that, notwithstanding his name not appearing as a shareholder in the books, or in the list sent to the Stamp Office, he is still a shareholder, and they must establish that fact. I will consider how far either the evidence establishes it, or whether, in fact, they are at liberty, by reason of the contract which they have entered into, to give any evidence for the purpose of showing that the fact is not so.

On this part of the case it becomes material to look at the provisions of the deed. They are certainly important. By the 83d clause, the board of directors are to cause to be delivered to every person executing the company's deed, and to every person approved by the board as fit to be a shareholder in the company, at the expense of such person, certificates specifying the number of shares which he holds. These are the certificates which were delivered to the holders, Mr. Thew and Mr. Millar, at their request. Then the board of directors are, by the 84th clause, to keep the name and place of residence of every person for the time being entitled to be registered, in a book called "The Share Register Book," and they alone are to have power to make any entry, erasure, or alteration in the share register book; therefore they are to keep the book, and it is only to be kept by their direction and under their orders. The 144th, 145th, and the 148th clauses are also material, as showing how a person may obtain a certificate from the directors certifying their consent to the shares numbered being transferred to certain other persons; but the 144th clause states that no person shall become or be registered as a shareholder without the consent of the board of directors. Therefore the books are not only to be kept under the direction of the board of directors, but no person shall become or be registered therein except by the order of the board of directors. By the 102d clause, the shareholders themselves are prevented from ascertaining the mode in which it is kept by actual inspection of the book. They can only require the board of directors to give them a certificate, signed by three persons, under the 83d clause, of their holding a certain number of shares; but if they get their certificate it shows that a person has been so registered. By the 158th clause it is stated that the share register

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book shall, as between the company and every person claiming to be a shareholder, be conclusive evidence on behalf of the company to show whether he or she is a shareholder in respect of such shares.

This, no doubt, is one of the reasons why this course has been adopted. A person, not being able to ascertain by actual inspection whether his name is inserted in a certain book or not, enters into a contract as to the method of his ascertaining, stating that his obtaining a certificate shall be proof of such fact, the contract also containing a clause which states that the book shall be conclusive evidence of the truth of whether a person is a shareholder or not. Then the book, on the assumption upon which I now proceed, expressly states that Mr. Thew is the shareholder in respect of these 200 shares; but clause 158 states that this is to be conclusive between the shareholder and the company. Mr. Thew is conclusively, therefore, as between himself and the company, the shareholder in respect of these 200 shares, which the company now say have never been transferred from the plaintiff. But is that the contract which has been entered into between them? Is it possible that the shareholder can tell whether the board of directors have actually complied with all the provisions of the deed in their mode of keeping the share register book? This is not a clause that the share register book, provided it be kept in the manner and under the directions hereinbefore contained, shall be conclusive evidence between them; but it is an express statement that the share register book shall be conclusive evidence, in respect of any shares, on behalf of the company, to show whether he is or not a shareholder in the company. Then, no alteration in the entry being made, it is conclusive evidence that Mr. Thew is at this moment a shareholder in the company; it is conclusive evidence, also, that Mr. Millar is a shareholder in the company. Can I, then, allow the board of directors to say, "All the entries in that book were fictitious; we kept them in a most irregular and improper manner;" and although we may be very much to blame, and you may have an action or suit against us, yet the company, who confided their interests to us, are not liable, and cannot be bound by an entry which we have, or some unauthorized person has, made in the share register book?" The answer of the plaintiff is, "That was not the contract which I made with you, that I was to be liable for any irregularity in the mode of keeping the books; the contract which I made was, that this book was to be conclusive evidence between us. I ascertained from the proper officer that the name of the person to whom I transferred my shares had been entered in the book, and I received, or the person to whom I transferred the shares received, a certificate from the transfer clerk that he had duly made the entry accordingly." Then that is conclusive evidence, and the plaintiff may well say, "I should never have entered into the contract if that was not to be conclusive evidence, because I should, in case you had not consented to these shares being transferred, have proceeded on the other clause in the deed, which was for my protection, and enabled me, in any manner I thought fit, to get rid of the shares." The case, therefore, makes

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it improper to allow the directors, or the board of directors, or the company, to give evidence that those entries were not valid.

It was suggested that the plaintiff might have applied for the certificate under clause 144, because that would have shown the consent. But assuming that he had, in the first place, on the construction of that clause, after Mr. Thew had received the certificate, the plaintiff could not have applied for it, because, as I read that section, it is only a person who is desirous to transfer—who is still a shareholder—who can apply for and obtain that certificate; and therefore, when once the other party, the transferee, has obtained the certificate, they might properly have refused, and say, “You have nothing to do with the certificate.” But how would he have been advanced, supposing he had applied for and obtained the certificate? The answer would have been, “It is true the certificate was given, but not by the board of directors; it was given by three directors, but they did not meet as a board; and the certificate does not advance you more than the 83d clause, which directs the certificate of transfer to be given by a board of directors. Though you have entered into a contract which does not enable you to see that the things are done, if we dispense with them, we may make use of them just as we please for our own advantage.” The only check on that is, that the share register book is to be conclusive evidence between the parties, and that book binds the parties who made the entries therein; and they shall not be permitted to say, “We, the board of directors, have not kept the book in the way we ought, but we have allowed unauthorized persons to make entries by the simple individual authority of the different directors, and not by the authority of the board.”

I am of opinion, therefore, that on that part of the case, if it stood there alone, the books being unaltered, and the book being produced in court without any alteration being made therein, and the name of Mr. Thew appearing as the holder of these shares, and not the name of the plaintiff, and the name of Mr. Millar appearing therein, and not the name of the plaintiff, and also the return from the Stamp Office appearing, in which the name of the plaintiff was returned as one who had ceased to be a shareholder, they could not, in that state of the case, have said to the plaintiff, “You are a shareholder, and you are liable to make contribution as to these shares.”

I now come to consider that the books, being produced, appear with a special entry, that the transfer made to Mr. Thew was invalid by reason of its not having had the consent of the board of directors; and the same with respect to Mr. Millar. This entry was made after a letter by Mr. Woods to the plaintiff, saying, “We deny the validity of this transfer; we are going to contest it, and to say that it shall not be allowed; in fact, we are going to say, you are now a shareholder in the company.” The plaintiff says, “I am not—I take issue on that point.” Then there is the *lis mota*; and after that, the defendants alter the books for the purpose of introducing his name again in the books and send a return to the Stamp Office with his name as a shareholder. Is that to benefit them? It is possible that a banking company can, in that point of view, determine the question at issue

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between the plaintiff and them by their own act? The cause was at issue between them the moment they wrote to the plaintiff, or, in fact, the moment they determined to contest the transfer of the shares: for I do not think it very material, if the alteration had been made with the view of asserting the fact of the plaintiff being a shareholder, even if it had taken place immediately before that letter. At what stage of the case are they to be allowed to do it? If they are to do it then, may they do it after they have put in their answer, — after they have had consultation with counsel, — after the case has been in the paper, — after the case has been heard, and before the appeal? I can see no period of time, if they might do it then, at which they might not do it up to the very time when the cause is heard, or between the actual decree and the next hearing. If they may do it, it is simply saying that they may alter the books, for the purpose of suiting their own individual case, at their own individual pleasure. It is possible, undoubtedly, they may have the power to do that, and that such may be the contract entered into between the parties; but I should require very strict proof that it is the contract between the parties. I inquired for the authority for this alteration by the board of directors, and was told that no express and distinct authority appeared, except from the 85th clause, which states that the board of directors shall alone have power to make any entry, erasure or alteration; which merely means that all the entries, erasures and alterations to be made in the books must be made by the board of directors, and by no other person; and the 156th clause states, that every entry, erasure or other alteration, which shall have been made upon the taking, purchase or acquisition of any shares shall be conclusive on the last shareholder. That confines the entry, erasure, and alteration to the occasion of the taking, purchase, or acquisition of any shares; it is not intended by that clause to give the board of directors a power of transferring shares from one person to another as they may think fit, at their own will and pleasure. It would require, therefore, a very strong and distinct clause in the contract, empowering the board of directors to make such an alteration as this in the books of the banks — in the book containing the share list.

It was argued that it was incidental to their power as directors to make alterations for the purpose of preventing errors: that, for instance, supposing a person had been entered under a wrong name, such as Walter instead of William, or the like, they would have had power to set that right. I think that incidental to their office as a board of directors; but that does not say they may vary the rights between parties. What does the alteration in this book amount to? Mr. Thew is the shareholder in the share register book. The board of directors say, "We will make Mr. Shortridge the shareholder with respect to these shares." But can they put Mr. Thew or Mr. Shortridge in the position they were in before contract entered into for the shares and before one had paid a large sum of money for them? Assume that Mr. Thew says, "I insist on being a shareholder, I think it likely to be profitable, and I wish to receive the dividends." The fact of the bank being in a failing condition, and not likely to pay divi-

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dends, cannot alter the question. But if they have the power to make these alterations, they might, from their own will and pleasure, or from any motive they thought fit, not having made the entry in the first place according to the directions and the mode pointed out by the deed of settlement, afterwards alter it in favor of any other person. It is settled by a variety of cases that Mr. Thew could not have resisted being a contributory. He had paid for the shares he had applied for, and got the certificate of being the holder of the shares; he had received the dividends on all the shares, one half of them direct from the company and the other half through Mr. Shotridge, the vendor; and Mr. Millar had received, in the same mode as the latter, the dividends on the shares transferred to him; and both of them had acted at public meetings as being the owners of the shares. If it were the case of a contributory under the Winding-up Act, could either Mr. Thew or Mr. Millar contend that they had not acquiesced in this, and had not thereby become contributaries to the company? If so, and Mr. Shotridge can be made a contributory, you may have double contributaries with respect to the same shares. Nothing I mean to say will affect the validity of the case of *Bosanquet v. Shotridge*, which I consider to be law; and nothing that I say will, in the slightest degree, affect *Morgan's case* (*In re the Vale of Neath and South Wales Brewery Company*), which I also consider to be law. It is a different question whether the contract entered into between the plaintiff and the company was not such that, at the end of 1847, under the circumstances that had taken place, he had not ceased to be a shareholder, and whether the company, by any act of theirs, can make him a shareholder subsequently to that period. I am of opinion that they cannot. I do not minutely examine the evidence with respect to several observations which have been made upon that part of the case. I rather put it upon the construction of the contract they have entered into, because, in my opinion, this is a case that must be tried by the contract which has been entered into between the plaintiff and the Union Bank and the equities arising out of it. The conclusion which I come to on the first question is, that the plaintiff is not a shareholder of the company, and their having put his name in the list does not make him so; and I am prepared to make a declaration to that effect.

Then comes the next question; but little need be said about it, as this was manifestly the action of the Union Bank. The letters are conclusive. It is a proposal by Mr. Watson, on behalf of the Union Bank, to Mr. Roy, on behalf of the London and Westminster Bank, to bring the action, and he says he will send them a list of their names. If I use the word "collusion," I do not at all use it in an invidious sense. It was a mode of endeavoring to enforce and establish the liability of the plaintiff to the Union Bank, but it was done at the request of the Union Bank; there was no concealment about it, either in their answer or in the documents they have brought forward. They openly state what the transactions were between them. In the whole of the proceedings the London and Westminster Bank act by the desire of the Union Bank; they send them a list; the

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London and Westminster Bank ask them whether they can usefully act upon it, as the name of Mr. Shortridge did not appear in the returns to the Stamp Office. That is suggested by Mr. Roy, and, in fact, disposes of an observation, that neither the share register book nor the Stamp Office return was at all necessary to enable the London and Westminster Bank to recover in the action, and that all that was necessary would have been to show that Mr. Shortridge was an original shareholder in the concern. But I think there is this answer to that observation, that if the share register book had been unaltered by the Union Bank, and if the return to the Stamp Office had been what it was in October, 1847, those being given in evidence would have rebutted the presumption to arise from the circumstance of Mr. Shortridge being the original owner, and would have therefore thrown the burden of proof on the persons contesting those entries, to have shown that Mr. Shortridge was still to be considered a shareholder. But was not this the action of the Union Bank? It is throughout stated that it is, and it is contested only on one single point. They say the money was paid to the London and Westminster Bank, and not to the Union Bank; that the Union Bank applied to receive the money to be recovered in this action, and that the London and Westminster Bank declined; and, therefore, you must try it by this test, that it is the action of the parties who recover the money. The money went to pay a debt of the Union Bank, and in what respect does it differ, if it was paid to the Union Bank direct, or if it was paid to the creditors of the Union Bank, and discharged *pro tanto* the liability of the Union Bank? It was, in fact, an action instituted by the London and Westminster Bank, indemnified against all consequences and against all costs by the Union Bank, for the purpose of trying this question. The Union Bank got great advantages, no doubt; they tried the question as if they stood in the place of a creditor; but, in this court they cannot do so; they are parties bound by the equities, upon which I have already expressed an opinion. I entertain no doubt whatever but that it was from the beginning the action of the Union Banking Company, brought by the London and Westminster Bank at their desire, for their purposes, and to effect their objects.

With respect to the question of any fraudulent sale of shares, I do not find it distinctly put in issue that Mr. Shortridge sold the shares with a fraudulent view to get rid of any liability which the concern was subject to fall into. There is a passage in the answer which suggests that he did. There is, however, no evidence whatever upon that subject. All the evidence is of this nature:—the last sale of shares was on the 20th of July; on the 27th of July, 1847, the general meeting was held, when a favorable report was made to the shareholders, and a dividend of 10*l.* per cent. declared. Two of the directors are examined, who state, they believe that report to be correct, and that they had no reason for doubting that it was a fair and *bona fide* report of the state of the concerns of the bank. It is suggested that Mr. Shortridge might have known that it was not really the state of the concerns of the bank; but it is impossible for me to discover from

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what means he could have known it, or that there is in the evidence the slightest suggestion that he could have discovered it, or that anybody could have ascertained, except the single person who did manage the affairs of the bank itself, that the affairs of the bank were not in such a condition as to verify the truth of the report then published. I cannot proceed upon any grounds of that description, there being neither the allegation nor the evidence to bear it out; and, therefore, I proceed upon the assumption that these were *bond fide* sales, and that there is nothing whatever to impeach them.

The result is, that there must be a perpetual injunction to restrain the levying execution upon this judgment. Mr. Shortridge must pay the London and Westminster Bank their costs of the suit, and add them to his own costs, and have them over again against the Union Banking Company; and the rest of the decree must be to the effect I have stated — a declaration that on the 28th of August, 1847, he ceased to be a partner in the bank, and the relief consequent upon that.

Some discussion then took place as to the costs of the action at law, but the court refused to make any order with respect to them.

GIBSON v. GIBSON.¹

January 20, 21, 24, March 15, and June 12, 1852.

Dower — Election.

A testator, by his will, gave all his freehold and leasehold messuages, tenements, &c., to trustees for all his estate and interest therein, on trust, to sell and apply the proceeds in manner thereafter declared; he then gave certain legacies out of his personal estate, and the residue thereof, together with the proceeds to be derived from the sale of his freehold and leasehold estate, he directed to be divided into four parts; one fourth he gave to his wife and the other three fourths to certain other relations. Amongst other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The testator, after the date of his will, had leased parts of his estates for terms of years, with an option to the lessees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved:—

Held, that the widow of the testator was not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will, and that she would take her dower according to the existing value of the estate, since the acts by which the value of the property had been altered were not her acts.

A QUESTION was raised in this case, whether the widow of Robert Gibson, the testator in the cause, was entitled to dower out of the testator's real estate in addition to the interest given her by the will, or whether she was to be put to her election.

¹ 22 Law J. Rep. (N. S.) Chanc. 346; 1 Drewry, 42. Before Vice-Chancellor KINDERSLEY.

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The testator, by his will, dated in October, 1844, gave certain specific chattels to his wife, and he also gave her a certain leasehold house which was occupied by himself during his lifetime. He then gave all his freehold messuages, lands, tenements and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises for all his estate and interest therein to trustees, upon trust, to sell the same and to apply the proceeds upon the trusts thereafter declared. The testator then gave his trustees power to sell his copyholds; and he directed that, until the sale of his freehold, copyhold and leasehold estates, the rents and annual profits thereof should be applied in the same manner as he should afterwards direct in respect to the annual interest of the moneys to arise from the sale of the same hereditaments and premises. The testator then gave various legacies out of his personal estate. First, he gave a sum of 4,000*l.*, East India stock, in trust for his wife, for her life; 2,000*l.* of the same stock in trust for Charlotte Sarah Faulkner and her children; 1,000*l.* sterling in trust for Sarah Robinson, for life, with remainder over; and then he gave several other pecuniary legacies, among others, 100*l.* to R. Faulkner; and he bequeathed the residue of his personal estate and of the produce of the sale of his freehold, copyhold, and leasehold estates upon the following trusts:—As to one fourth part to his wife absolutely; as to another fourth part to his sister, Louisa Gibson, for life, with remainder to certain nephews and nieces; another fourth part to Mary Faulkner, for life, with remainder over to several persons, among whom were R. Faulkner and Sarah Robinson; and the remaining fourth part to Charlotte Sarah Faulkner and her children, in the same manner as the sum of 2,000*l.* East India stock.

The testator died in 1847, leaving his wife surviving; but previously to the date of his will the testator had agreed to let one portion of his real estate, called the Hornchurch estate, for three years and a half, with an option to the tenant to take it for seven or fourteen years, and after the date of his will he agreed to sell the same estate to the tenant thereof. As to the other portion of the testator's estate, called the Shelton estate, he had contracted, after the date of his will, with a person named Davies, that he might pull down certain buildings upon the estate and erect others, and that he would grant him a lease for thirty years, with an option to purchase.

Bethell and *Rogers* appeared for the plaintiffs, who were the persons entitled to the three fourths of the estate not given to the widow, and contended that in this case the widow ought to be put to her election on these grounds:—First, that the testator, in devising his freehold and leasehold estates, had used the words "all my estate," &c., by which it was evident he intended to devise the whole estates as he enjoyed them himself; that he used these words with an intention to exclude his widow from dower, and that her title to dower would be inconsistent with the terms used by the testator. Secondly, on the ground that the devise was in trust for sale; that if the widow were to be entitled to dower, the sale of the estate would be greatly obstructed, and the object of the testator would be frustrated. Thirdly,

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that the testator had directed the rents and profits until sale to be applied in the same way as the money derived from the produce of the sale, and that this would be inconsistent with the claim to dower. Fourthly, it was evident, from the whole tenor of the will, that the testator never contemplated that his widow would be entitled to dower; he had mixed up the freehold and leasehold estate as well as his personal estate, and divided it in equal portions between the several branches of his family, giving his wife one portion; this object would be defeated if the widow were to have her dower as well as the benefits given her under the will, and an inequality would be introduced which was quite contrary to the spirit of the trusts. *Chalmers v. Storil*, 2 Ves. & B. 222; *Miall v. Brain*, 4 Madd. 119; *Dickson v. Robinson*, Jac. 503, and *Roberts v. Smith*, 1 Sim. & S. 513. Another reason for putting the widow to her election was founded on the dealings which the testator during his life had entered into with the property; that, as by the 24th section of the Wills Act, 1 Vict. c. 26, the will was to be construed as made immediately before the death of the testator, the will in this case must be taken to speak from a period subsequently to the contracts; and, therefore, that the intention of the testator was to exclude his wife from dower, since the claim of the widow would seriously interfere with these contracts.

The following cases were also cited:—*Boadley v. Dixon*, 3 Russ. 192; *Lowes v. Lowes*, 5 Hare, 501; *Grayson v. Deakin*, 3 De Gex & S. 298; *Hall v. Hill*, 1 Dr. & War. 94; *Jones v. Collier*, 2 Amb. 730; *Daly v. Lynch*, 3 Bro. P. C. 478; *Parker v. Downing*, 4 Law J. Rep. (N. S.) Chanc. 198; *Ellis v. Lewis*, 3 Hare, 310; *Reynolds v. Torin*, 1 Russ. 129; *Robinson v. Wilson*, 13 Irish Law and Eq. Rep. 168; *Birmingham v. Kirwan*, 2 Sch. & Lef. 444.

Rolt and *F. S. Williams*, for the widow, contended that she was entitled both to the interest given her by the will and to her dower. The testator had given all his freehold and leasehold messuages, &c. for all his estate and interest therein, but the claim to dower was not inconsistent with this gift. He could use no other form of expression than his estates when he was giving the property he had; and in adding "for all his estate and interest therein," the estate and interest which he had was subject to dower, and it was a rule that the widow should have her dower, unless her right was expressly excluded. Then, as to the argument that the estate was given upon trusts for sale. There was no difficulty whatever in selling the estate, subject to dower, and there was no reason for supposing that the testator did not intend his property to be sold subject to his widow's dower. The direction that the rents should be applied until sale in the same way as the produce of the sale, was as likely to mean the rents of the estate subject to dower, as the produce of the estate might mean the produce of a sale subject to dower. It had been said that the widow was to receive an equal share with the other legatees under the will, but this was not the case, since various sums were added to each share, and no two were equal. Therefore, no argument founded upon the cases of *Chalmers v. Storil* and *Miall v. Brain* could be of any avail. As to

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the argument that the testator had dealt with the estate before his death, no change of intention could be discovered from the words of the will, and that fact alone was not sufficient to deprive the widow of her dower. The following authorities were also cited:— *French v. Davies*, 2 Ves. jun. 572; *Lawrence v. Lawrence*, 3 Bro. P. C. 482; *Holdich v. Holdich*, 2 You. & C. C. C. 18; *Doe d. Oxendon v. Chichester*, 4 Dow, 65; *Dummer v. Pitcher*, 2 Myl. & K. 262.

Judgment reserved.

June 12. *KINDERSLEY, V. C.* The question in this case is, whether the widow of the testator ought to be put to her election between her dower and the benefits given her by her husband's will. It is difficult, perhaps impossible, to reconcile all the authorities on this subject; but one cannot examine them without finding certain broad and clear principles, forming the foundation of every decision on the subject. These principles may be stated in the following manner:— The first is, that the doctrine of election is founded on the same reasons, and governed by the same rules when applied to a widow claiming dower, as when applied to any other case. The second proposition, as applicable to all cases, is; that a person who is entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right or interest the assertion of which would defeat, even partially, any of the provisions of that instrument; and applying this to the case of dower, the doctrine is, that if the testator has made such a disposition of his real estate, as that the assertion by the widow of her right to dower would prevent that disposition taking effect as the testator intended, then she must elect to abandon either her dower, or the benefit given her by the will. The third proposition is, that in no case is a person to be put to an election, unless it is clear that the provisions of the instrument, under which he is entitled to any benefit, would be, in some degree, defeated by the assertion of his other rights. And, therefore, in the particular case of dower, unless it is beyond reasonable doubt that the assertion by the widow of her right to dower would prevent the giving full effect to the testator's intention, the widow shall not be put to her election. It is not enough to say that, upon the whole will, it may fairly be inferred that the testator intended his widow should not have her dower; in order to compel her to elect, the court must be satisfied that there is a positive intention, either expressed or clearly implied, that she is to be excluded from dower. The fourth proposition is, that the intention to exclude the widow from dower must be apparent on the face of the will itself.

In support of these principles I will refer to the language of several eminent judges. In *Miall v. Brain*, Sir J. Leach said, "A wife is put to her election on the same principles as a stranger is. To put the wife to an election, there must be a clear intention to exclude her from dower, either express or implied." In *Birmingham v. Kirwan*, Lord Redesdale said, "the general rule [of election] is, that a person cannot accept and reject the same instrument." The same principles

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are laid down in *French v. Davies*, and they are, as I conceive, undeniably established, and I shall endeavor strictly to adhere to them in deciding the case now before me.

[His Honor then stated the particular dispositions in the will, and continued]—Now, the grounds on which it is contended that the widow ought to be put to her election are the following:—First, that as the testator, in devising his freehold and leasehold estates, has used these words, “all my freehold,” &c., it is apparent that he meant to devise the whole of his estates in the same state he held and enjoyed them himself; that he intended by the use of those expressions to exclude his widow from dower; in other words, that the claim of the widow to dower would be inconsistent with the testator’s disposition of his property. When this argument was addressed to Lord Thurlow, in *Foster v. Cook*, 3 Bro. C. C. 347, he gave this answer:—“Because the testator gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he had not.” That answer appears to me to demolish entirely the argument derived from the fact that the testator has used the words “all my lands,” &c., and when it is recollected that it is only because the lands are his, that the wife is entitled to dower out of them at all, it would be strange if his describing them as his should have the effect of excluding her from her right to dower. She is entitled to dower only because the lands are his; and the argument is, that because he describes them as his he meant to deprive her of dower. The testator also adds, “for all my estate and interest therein respectively;” and it has been justly argued, that these words show that he intended to devise the lands as he himself had them, but that is subject to his widow’s dower. However, I am not desirous of drawing any assistance from those words in support of my view on this point, because I am unwilling to lend any countenance to the notion that without those words there would be a doubt. I will only add, that it makes no difference whether a testator devises all his lands, or all his estate and interest in his lands.

The second ground on which it is contended that the widow must be put to her election is, that the devise is in trust for sale. If it were impossible to sell lands subject to a widow’s right to dower, or to sell the remaining two thirds, after setting out by metes and bounds one third for dower, or to sell the reversion of the third part thus set out, that might defeat the disposition made by the will for sale of the estate; and then she might be put to her election; but there is, in fact, no difficulty whatever in selling an estate subject to the widow’s dower; and, consequently, there is no ground for holding that a devise in trust for sale is a sufficient reason for putting the widow to her election. No doubt a less amount of purchase-money would be obtained, but there is no more difficulty in selling the land subject to dower than in selling any other reversionary interest in land, subject to some precedent interest. I believe there is no case in which a widow has been put to her election on the mere ground for a devise in trust for sale. In *Miall v. Brain*, Sir J. Leach, although he decided against the claim of the widow on another ground, did not even men-

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tion that trust for sale as a reason for his decision. In *Ellis v. Lewis*, Sir J. Wigram held that a devise on trust for sale was not a ground for putting the widow to her election. In *Parker v. Downing*, the reason why the trust for sale was held to be a ground for putting the widow to her election was, that the property devised for sale was a dwelling-house, with the furniture therein, and the court considered that if the widow was to have one third, a sale could not be effected of the whole, as the testator intended; but there is nothing in that case to show that a mere trust for sale will exclude the widow's dower. The only authority which seems to afford any countenance to the proposition that the widow's claiming her dower could be incompatible with a trust for sale, is the language of Lord Alvanley, in the case of *French v. Davies*, where he observed that if the widow insisted upon her dower, she would obstruct the sale; but he decided in her favor, because she was willing to accept satisfaction out of the purchase-money. It does not appear in what way Lord Alvanley considered that the sale would be obstructed by the claim of dower, and it is difficult to conceive how the obstruction could make it clear that the testator could not have intended the sale to be effected subject to dower; and it may be observed that his Lordship, in the same case, expresses his approbation of the proposition, that you are to look into the will, and see whether it is clear that the testator could not possibly give what he has given, consistently with the claim of dower. I think, therefore, that the circumstance of the real estate being devised on trust for sale, is not sufficient to put the widow to her election.

The third ground taken is this:— that the testator directs that the rents and profits until the sale shall be applied in the same manner as he afterwards directs with respect to the income arising from the produce of the sale. Now this I consider an argument in a circle. The rents and profits alluded to by the testator are, of course, the rents and profits of the land devised for sale; and, in order to prove that the devise of the lands for sale is intended to be of the lands discharged of dower, the argument assumes that the rents here spoken of are the rents of the lands so discharged. This is an argument completely in a circle. Suppose a testator were to devise his freehold lands to his son, being an infant, in fee; that would certainly not put the widow to her election. Suppose we were to add that, during the infancy of his son, the rents should be applied for his maintenance; this mention of the rents would not put the widow to her election. Or, suppose a devise to trustees in trust for A for life, with remainder over; that would not put the widow to her election, nor would it make any difference if the testator directed the rents to be applied for her separate use. I confess I cannot in this case see why the direction, that until the sale the rents are to be applied in the same manner as the produce of the sale, should have the effect of putting the widow to her election.

The fourth ground is, that an equal fourth part of the proceeds of the sale of the real estate and of the residuary personal estate is given to the widow and the other three recipients; and it is argued that, according to *Chalmers v. Storil*, *Dickson v. Robinson*, and *Roberts v.*

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Smith, there is an indication of intention to make an equal division of his bounty; and therefore she is put to her election. The two last cases were decided simply on the authority of *Chalmers v. Storil*, which makes it material to consider the principle of *Chalmers v. Storil*, to see how far that principle may be approved of, and also in what manner, if that case was rightly decided, it applies to the present case. In *Chalmers v. Storil*, the testator devised in this way: — “ I give to my dear wife, A. M. Chalmers, and my two children, namely, my daughter Anna M. Chalmers, and my son John Chalmers, all my estates whatsoever, to be equally divided amongst them, whether real or personal, making no distinction in favor of the male, as it is my intent that my daughter shall have an equal share with my son of all my property, after paying the following legacies;” he then proceeded to specify particular property as the property bequeathed by him. In that case Sir W. Grant, on the ground of the testator having described the particular estate and items of property, thought he discovered an intention on the part of the testator that the wife and the two children should enjoy in equal shares whatever he was enjoying at the time of his death. The decision in that case has been the subject of very just criticism; and I must avow that the reasons assigned by Sir W. Grant for his decision are, to my mind, far from satisfactory. Still, the respect — I may say the reverence — due to any decision of Sir W. Grant would deter me from venturing to set up my own opinion against it, if I found it strictly applicable to the case before me; but this case is very different from *Chalmers v. Storil*. I do not find here any thing approaching to a clear indication of intention that the wife and the other persons benefited should be on an equality; neither do I find any specification of the items of the property intended to be devised. So far from intending equality among his wife and the other objects of his bounty, he gives them very unequal benefits. To his wife, in addition to one fourth of the proceeds of the sale of his freehold, copyhold, and leasehold estate and of the residuary personal estate, he gives his furniture, plate, linen, &c., and a specific part of his leasehold property, and a life interest in 4,000*l.* East India stock; to Charlotte Sarah Faulkner and her children, in addition to one fourth of the proceeds of the sale of the real and residuary personal estate, he gives 2,000*l.* East India stock; to Robert Faulkner, in addition to a reversionary interest in one-fourth of the proceeds of the sale of the real and residuary personal estate, he gives 100*l.*; to Sarah Robinson, in addition to a similar reversionary interest in one fourth of the real and residuary personal estate, he gives a life interest in 1,000*l.* In fact, there are no two of the objects of his bounty to whom he gives equal benefits, and the extent of benefit given to his wife is quite different from that which is given to any other person. I cannot, therefore, say that he has evidenced any intention of equality in the distribution he has made of his property, but has, on the contrary, expressed an intention of very great inequality. Whatever may be the respect due to the decision in *Chalmers v. Storil*, its authority must be confined to cases where the testator intends to give to his wife and the other objects of his bounty all that he himself possessed

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and enjoyed, in equal shares and proportions. I may also refer to the words of qualification which the testator in this case adds to the devise in trust for sale, "for all my estate and interest therein respectively." These words appear to me to exclude all inference that the testator intended to devise any other estate or interest in the lands than that which he himself had, that is, an estate subject to the widow's right to dower.

The fifth ground taken was founded on certain dealings which the testator had had during his lifetime with respect to his property. The real estate consisted of two portions — the Hornchurch estate and the Shelton Court estate. As to the Hornchurch estate, it appears that before the date of his will, the testator had agreed to let it for three years, with an option to the tenant to take it for a longer term, and that after the date of his will he agreed to sell it to the lessee. With regard to the Shelton Court estate, the testator, after the date of his will, contracted with a person named Davies that he might pull down certain buildings and erect others; and the testator agreed that he would grant him a lease for thirty years, with an option to purchase. On these transactions, it is contended that since, by the 24th section of the Wills Act, the will is to be construed as made immediately before the death of the testator, the will in this case must be taken to have been made after the contracts, and consequently that the testator must have intended to exclude his wife from dower. Now, upon this argument I must observe, first, that by the 3d section of the Wills Act, it is enacted, "that it shall be lawful for every person to devise, bequeathe, or dispose of all real and personal estate which he shall be entitled to, either at law or in equity, at the time of his death; and that the power hereby given shall extend to such estates, &c., as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." The only effect of this section therefore is, to give power to devise after-acquired real estate. Before the passing of this act, if a testator purported to devise after-acquired real estate, his heir might have been put to his election; but it would not follow that by a devise of all his real estate he intended to devise his after-acquired estate; and, therefore, the 24th section supplied what the 3d section would not have effected, by enacting that, *quoad* the property that was to pass by a will, the will was to be considered as made immediately before the testator's death. So that, if a testator gives all his real estate, this devise will include any property acquired after the date of the will. But am I, therefore, to say, if a testator makes a will, the effect of which, apart from the Wills Act, would not be to exclude the wife's dower, that because the act says that *quoad* the property which would be included, the will is to speak at his death, therefore a different construction is to be put on the will as to the intention to exclude dower, and that it is to be read as if the execution of the will had immediately preceded his death so as to impute to him a change of intention? I think that would be a perversion of the intention of the legislature. But even if the dealings had taken place before the date of the will, still, there being in

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the will no reference to the contracts, I should hesitate much before arriving at the conclusion that a testator's dealings in his lifetime could be taken into consideration in construing his will. With reference to the question whether he intended to exclude his wife from her dower, when the will itself contains no reference to those dealings, the intention to exclude the widow's dower must be collected from the will itself; and the court cannot, in my opinion, look at evidence of acts done in the testator's lifetime, which are not noticed in the will.

I have now gone through all the arguments adverse to the widow's claim, and considering, that, to establish the case against the widow, I must be able to collect a clear intention to exclude her from dower, or that I must find such a disposition of the testator's property, that the widow's claim to dower would defeat his intention clearly expressed, I am of opinion that no such case is made. If I were to declare in this case that the widow ought to be put to her election, I think I should be violating the principles which lie at the very root of the whole doctrine. The declaration will, therefore, be, that the widow is not put to her election, and that she is entitled to her dower. And as the acts by which the value of the property has been altered, were not her acts, she will be entitled to take her dower according to the present value of the property.

STUMP v. GABY.¹

December 11, 1852.

Deed — Voidable Conveyance — Devisable Interest — Confirmation.

To a bill by an heir at law, charging that the defendant A was in the possession of the estate of the ancestor under a conveyance impeachable on the ground of fraud, and praying that the conveyance might be set aside and that any testamentary disposition thereof by way of confirmation might be declared void, A pleaded the will of the ancestor, by which, after reciting that certain members of his family had threatened to impeach the conveyance, he thereby confirmed the same, and devised the estate to A in fee. The plea was allowed, affirming the order of the court below.

Where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir, and which he may dispose of by his will.

Distinction between a confirmation by deed and by testamentary disposition of a conveyance liable to be avoided on the ground of fraud.

THIS was an appeal from an order of Lord Cranworth, V. C., allowing a plea to the whole bill.

The bill, which was filed by J. W. Stump, as one of the co-heirs of Ayliffe White, the testator, against Edward Gaby, Mary A. Gaby,

¹ 22 Law J. Rep. (N. S.) Chanc. 352; 17 Jur. 5.

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and Thomas Gaby, who derived title under Ralph H. Gaby, a purchaser of some of the devised estates from Ayliffe White, the grandson of the testator, stated that Ayliffe White, by his will, dated the 2d of September, 1760, devised certain real estates to his son, Henry Boswell White, for life, with remainder to trustees to preserve contingent remainders, &c.; with remainder to Ayliffe White, the son of the said H. B. White, for his life; with remainder to trustees to preserve, &c.; with remainder to the first and other sons of Ayliffe White (the grandson) in tail male; with remainder to the second and other sons of H. B. White in tail male; with remainder to the testator's son, Francis White, and his first and other sons, in tail male; with remainder to the testator's son, John White, and his first and other sons, in tail male; with remainder to the testator's own right heirs forever.

The testator died in 1761, leaving H. B. White, his eldest son, and Francis White, and John White, his only other sons, and Ayliffe White, his grandson, him surviving.

Francis White died in 1761, leaving Henry White, his only child, him surviving; who died in 1799, having had four sons, three of whom died under age, and the third, in 1806, intestate and without having been married; and several daughters, through one of whom the plaintiff claimed.

John White, another son of the testator, died in 1781, without having been married. Henry Boswell White, the eldest son of the testator, died in 1774, leaving Ayliffe White, his only child, him surviving; who died in 1826 without having had any issue.

The bill then stated that, on the death of Ayliffe White, the grandson, without issue, the surviving daughters of Francis White and the children of those who were dead were the right heirs of the testator in coparcenary; but that the mother of the plaintiff was then under coverture, and so continued down to 1841. The bill then set out pretences by the defendants that Ayliffe White, the grandson, was seised in fee of the devised estates, and had disposed of them by his will; or that, being so seised, he had conveyed away the same by certain assurances for valuable consideration; whereas the plaintiff charged that Ayliffe White, the grandson, had only a life interest in the devised estates. The bill then charged that Ayliffe White was during his life, in very embarrassed circumstances and in prison for debt, and that one Ralph H. Gaby was his attorney; and that, whilst acting in such capacity, and taking advantage of his embarrassments, he obtained from him a deed of assignment or other assurance of his interest in the said devised premises, upon an express trust, or for a wholly inadequate consideration; and that under color of such assignment Ralph H. Gaby entered into the possession of the devised premises; and it charged that any such assignment or assurance ought to be declared void as against the plaintiff, as also any testamentary disposition expressed to be made by way of confirmation of the same.

The bill then prayed an account of the devised estates, and that the will of the testator might be carried into effect; and that it might be declared who, in the events that had happened, were entitled to

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the devised estates upon the death of Ayliffe White, the grandson; and that any deed or deeds which might appear to have been executed by Ayliffe White, the grandson, or any testamentary disposition by way of confirmation thereof, might be declared null and void against the plaintiff, and for delivery up of possession of the devised estates to the plaintiff; and for an account of the rents and profits, &c.

The other alleged heirs in coparcenary of the testator were made defendants, and were served with a copy of the bill.

To this bill the defendants, Edward Gaby and Mary A. Gaby, put in a joint and several plea, as follows:—

That after the decease of H. B. White, Ayliffe White, the grandson, being of sound and disposing mind, duly made and published his last will, dated the 22d of September, 1819, and duly executed and attested in such a manner as was then by law required for rendering valid devises of freehold estates of inheritance; and thereby gave and devised as follows; [the will was then set out, disposing of certain real estate]. And that afterwards the said Ayliffe White, the grandson, duly made and published a codicil to his said will, dated the 17th of March, 1820, and duly executed and attested in the manner then by law required for rendering valid devises of freehold estates of inheritance; and thereby gave and devised as follows: "Whereas, some time in the year 1812, I sold and conveyed to Ralph H. Gaby, N. Atherton, and W. Whitworth the reversion in fee of certain messuages, farms, lands, and hereditaments at Kington, &c., expectant and to come into possession on my decease without male issue, subject to an annuity of 150*l.* to my wife; and I also joined in granting and confirming to the said Ralph H. Gaby the reversion in fee of my farm at, &c.; and whereas John Wilkins, who intermarried with one of the family of Harry White, has thought proper to threaten that such conveyances shall be disputed; now, in order to prevent all dispute, I hereby ratify and confirm the conveyances made to them, the said Ralph H. Gaby, N. Atherton, and W. Whitworth, of the said estates and hereditaments, subject to the annuity aforesaid; and for further assurance and confirmation, I do hereby, subject to the annuity aforesaid, give and devise to the said Ralph H. Gaby the several farms, lands, and hereditaments which were then in the occupations, &c., (describing them,) to hold to him the said Ralph H. Gaby, his heirs and assigns forever." And that the said Ayliffe White, the grandson, died without having altered or revoked his said will, save by the said codicil, and without having altered or revoked his said codicil, leaving the said Ralph H. Gaby, N. Atherton, and W. Whitworth him surviving. All which, &c.

The plea came on to be argued before Lord Cranworth, V. C., and on the 5th of March, 1851, his Lordship made an order allowing the plea.

The plaintiff then presented a petition of appeal from this order to the Lord Chancellor: and the petition coming on for hearing on the 13th of March, 1852, and the plaintiff not appearing, the order of the Vice-Chancellor was affirmed and the petition dismissed.

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The plaintiff then applied for a second rehearing, which was granted.

W. P. Wood and G. E. Cottrell, for the appeal. The conveyance to Gaby was not void, but voidable only; and if the purchase had been set aside, a reconveyance would have been necessary. The testator, therefore, had no interest that would pass by his will, but a right of action only. "By construction upon the statute, a will can operate only upon the estate the testator had at the time he executed it." Per Eyre, C. J., *Cave v. Holford*, 3 Ves. 650, 664; and *The Attorney General v. Vigor*, 8 Ves. 256. Again: the plea is defective, because it does not meet the case made by the bill, that the conveyance was obtained under circumstances amounting to fraud; therefore this must be taken to be true. In order to make the confirmation valid, it is necessary to show that the testator was aware of his exact position in regard to his right to avoid the conveyance. *Crowe v. Ballard*, 3 Bro. C. C. 117; *Roche v. O'Brien*, 1 Ball & B. 330; *Dunbar v. Tredennick*, 2 Ibid. 304.

Bethell and J. V. Prior, contra, were not called upon to address the Court.

The LORD CHANCELLOR. I thought this point had been concluded by decision, namely, the effect of a devise after a void contract. How the doubt in this case arose I am at a loss to imagine. The case made by the bill is, that the person under whom the plaintiff claims as heir, executed a conveyance to the defendant, which was liable to be set aside upon equitable grounds. The plaintiff says he is heir at law, and as such entitled to set it aside. The plea says, that the testator has devised the estate, and that if there was any descendible estate in him, it has passed by his will. The answer made to that is, that under the old statutes you cannot devise a right of entry: and that the interest of the testator was a right of entry. That point has to be established. Secondly, it is said that the confirmation is of no value, because it is not shown that the testator was aware of the circumstances under which the fraud existed, and that he had a right to set the deed aside.

In the first place, this is no right of entry; for the whole legal fee passed by the conveyance, and, consequently, the testator had no estate at law and no remedy at law. Whether the deed can be maintained in this court or not is another question; but the deed is neither void nor voidable at law. What then is the interest of a man in an estate which he has conveyed to an attorney in a manner in which the attorney cannot maintain it? In the view of this Court, he is still owner of the estate, subject to the repayment to the attorney of the money he has received; and the consequence is, that he may devise that estate as an equitable estate; and it is open to no question of right of entry or action. I have a strong impression that I could find an authority disposing of the very point; but, if not, I am ready to make an authority now. I have not the slightest doubt but that this person had an equitable estate which he could devise. He

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has devised it. If it had been left to descend, it would have gone to the heir at law.

But it is said a conveyance to an attorney may or may not be good in this court. It is good at law, and in this court it is *prima facie* good. But assume that the deed was impeachable. The testator, by his will addresses himself to this very point. He says, "Parties intend to impeach this deed; now I hereby confirm it, and by way of confirmation I devise the estate to the purchaser." The statute of Wills says nothing to prevent this; for the testator has an equitable estate, and a man may by his will confirm a voidable conveyance. If a client, after having ascertained that he has a right to set aside a conveyance to his attorney, chooses to confirm it, he may do so. But there is a difference between his position under a contract and under a will. If an attorney get a conveyance by fraud, and afterwards obtain a confirmation of that conveyance, he has to show fair dealing in obtaining the confirmation that he has communicated to his client all the knowledge he has, and that his client has confirmed it with that knowledge. I have no intention to disturb that position. But what has that to do with this case? Here there is no dealing with the attorney, but there is a disposition of a man by his will in favor of a person with whom he has had dealings. He says "There is some dispute. I choose to confirm the conveyance;" and he has the right to do so. This is testamentary and not contract, and the will is the guide under which the court must act. If he had simply said "I confirm it," that would have been a valid confirmation, giving to the attorney the advantage of not having his conveyance disturbed. I have no doubt but that this point has been already decided. I dismiss this appeal, but without costs, as it is a pauper suit.

PENNY v. GOODE.¹

January 14, 1853.

Production of Documents — Public Company.

Upon a bill filed against three directors, who were also treasurers and trustees of a public company, the defendants were required to produce documents which, by their answer, they stated to be at the office of the company, but not otherwise in their possession, custody, or power. The defendants, previously to the motion for production, had ceased to be treasurers and trustees:—

Held, that the defendants could not be compelled to produce documents which were not in their exclusive possession, but only in their possession jointly with the other directors of the company.

THIS suit was instituted by a party whose property was insured in the Westminster Fire Insurance Office, and who claimed against

¹ 22 Law J. Rep. (N. S.) Chanc. 371; 17 Jur. 82.

Harrison v. The Corporation of Southampton.

HARRISON v. THE CORPORATION OF SOUTHAMPTON.¹

February 24 and 25, 1853.

Evidence — Sentence of Ecclesiastical Court — Nullity of Marriage.

A married B by license in 1798, during the time that the 26 Geo. 2, c. 33, was in force. In 1802 B commenced a suit, in the Ecclesiastical Court, against A of nullity of marriage, on the ground that she was a minor at the time of the marriage, and that her father's consent had not been given. It was proved in the suit that A was a minor, and that her father was absent at the time of the marriage. A sentence of nullity was pronounced in June, 1802. In May, 1802, C, the only child of the alleged marriage, was born. Upon an inquiry who was the heir at law of A, C claimed to be sole heiress, and objected to the reception, as evidence, of the sentence of the Ecclesiastical Court, on the ground that it had been fraudulently and collusively obtained. In support of this case, C produced a bond, given by A in 1801, for securing an annuity to B for her life for her separate use, in which it was declared that it should remain good notwithstanding a sentence of nullity of marriage, and produced a witness to prove conversations between A and B previously to the suit, in which they agreed that A should give B an annuity, and that legal proceedings to annul the marriage should be taken:—

Held, that the sentence was not fraudulently or collusively obtained, and was admissible in evidence.

A REFERENCE was made to the Master in this suit, to inquire who was the heir at law and who were the next of kin of Henry Hartley, deceased.

In this inquiry a claim was put in by Mrs. Roofe to be sole heiress at law and next of kin under the circumstances hereafter stated.

By the 26 Geo. 2, c. 33, (the Marriage Act,) it was enacted that, all marriages solemnized by license after the 25th of March, 1754, where either of the parties, not being a widower or widow, should be under the age of twenty-one years, which should be had without the consent of the father of such of the parties so under age, (if then living,) first had and obtained, or if dead, &c., of the guardian, &c., should be absolutely null and void to all intents and purposes whatsoever.

On the 24th of November, 1798, Henry Hartley married by license Celia Ann, the daughter of James and Elizabeth Crowcher, at Portsea. The marriage certificate was as follows:—

“ Henry Hartley, bachelor, and Celia Ann Crowcher, a minor, both of this parish, were married in this church by license, with the consent of her mother, this 24th of November, 1798, by me
 (“ Name of the officiating minister.”)

In 1802 a suit was instituted in the Consistory Court of Winchester by Mrs. Hartley against Mr. Hartley for nullity of marriage, on the ground that her father was living at the time of the marriage and did not give his consent to it, as required by the Marriage Act. The

¹ 22 Law J. Rep. (N. S.) Chanc. 372.

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suit proceeded, and witnesses were examined. It was proved that Mrs. Hartley was a minor at the time of the marriage, and that James Crowcher, her father, who was a mariner, was with his ship and absent from Portsea at the time of the marriage. The sentence of the court was pronounced on the 25th of June, 1802, by which it was declared that the alleged marriage was null and void to all intents and purposes whatsoever, pursuant to the act, and that both parties had free liberty to marry again.

In May, 1802, Mrs. Hartley gave birth to Sarah Ann, afterwards Mrs. Roofe, the claimant in this case.

Mrs. Roofe insisted that this sentence ought not to be received in evidence, on the ground that it had been obtained by fraud and collusion. In support of this case was produced a bond, dated the 26th of November, 1801, given by Mr. Hartley to a Mr. Francis. The condition of the bond was as follows:—

“Whereas the above-bounden Henry Hartley and Celia Ann, his wife, by their mutual desire and at their mutual request, have agreed to live separate and apart from each other, and the said Henry Hartley is desirous to make a provision for the maintenance and support of the said Celia Ann by allowing her the sum of 100*l.* per annum in manner hereinafter mentioned. Now the condition of the above written obligation is such, that, if the above-bounden Henry Hartley, his heirs, executors, and administrators, do and shall, during the natural life of the said Celia Ann, his wife, well and truly pay or cause to be paid unto the above-named Francis Francis, his executors, administrators, and assigns, one annuity or clear yearly sum of 100*l.*, by even quarterly payments of 25*l.* each in every year, the first payment thereof to begin and to be made on the 25th of March next ensuing, the date of the above-written obligation, in trust, to be by the said Francis Francis, his executors, administrators, and assigns, forthwith paid to the said Celia Ann Hartley for her sole and separate use, support, and maintenance, (whose receipt alone shall be a sufficient discharge for the same,) or do and shall pay into the hands of the said Celia Ann Hartley, for the purpose aforesaid, the said annuity or clear yearly sum of 100*l.*, by even quarterly payments on the days and times herein above mentioned for payment thereof, (notwithstanding any sentence of nullity of marriage which may be hereafter obtained by either of them, the said Henry Hartley and Celia Ann, his wife, in any ecclesiastical court by reason of minority or upon any other account whatsoever,) then the above obligation is to be void.”

A sister of Mrs. Hartley (then upwards of eighty years of age) was produced as a witness, and examined *videlicet*. A part of her evidence was as follows:—“I was present when a conversation took place between Mr. and Mrs. Hartley as to dissolving their marriage. The effect of the conversation was, that she was to marry again, if she thought fit, and he too, and he was to allow her 100*l.* a year. Nothing else particular was said. He said he would leave her all he was worth if he died first. I heard him say that. My sister agreed

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to take the 100*l.* a year in my presence, and seemed very pleased to do so, as she had no home of her own. They agreed that legal proceedings should be taken for the purpose. Mr. Hartley himself proposed that my sister should have the 100*l.* a year. They both proposed that legal proceedings should be taken; they agreed it should be so. After this conversation they went to London for that purpose. They went together to London, and returned together."

The Master, by his report, found that the alleged marriage was performed by license and without proper consent on behalf of the father or guardian of the said Celia Ann Crowcher, pursuant to the act of parliament; and that such alleged marriage was, pursuant to a sentence or decree of the Consistory Court of the Bishop of Winchester, bearing date the 25th of June, 1802, pronounced or declared to be null and void.

To this report Mrs. Roofe took the following exception (among others) — "That the said Master ought not to have so certified, and ought not to have admitted such alleged decree or sentence as evidence against the said W. Roofe and Sarah Ann, his wife, but ought to have found that such alleged decree or sentence was obtained from the said Consistory Court by fraud and collusion between Henry Hartley and Celia Ann Hartley, his wife, as the parties to the suit in which such sentence or decree is alleged to have been made, and that such alleged decree or sentence cannot be used, and is not admissible as evidence against the said claimant, W. Roofe and Sarah Ann, his wife."

The exceptions now came on to be heard.

● *Daniel and Cole*, for the exceptions, cited *The Duchess of Kingston's case*, 2 Smith's Lead. Cases, 424, and contended that, upon the evidence, it was clear that the suit had been concocted by the husband and wife together, and that the sentence had been fraudulently and collusively obtained, and ought not to be received in evidence.

Malins and Giffard, for the report, were not called on.

Russell and Shebbeare, for the mayor and corporation of Southampton.

Glasse and W. W. Cooper, for other parties.

STUART, V. C. The question before the court is as to the admissibility in evidence of a sentence of an ecclesiastical court of nullity of marriage. It was objected that, because it was obtained in a suit which was collusive, it ought not to be received as evidence and ought to be treated as a nullity. There is no doubt that this would be so if there was clear evidence that the suit was collusive, and that the sentence had been obtained fraudulently and improperly. In questions of this kind, where a sentence is produced, it is to be presumed that all things are properly and solemnly done, and this presumption will remain until it is rebutted by facts alleged and proved.

 Drake v. West.

Cases may occur in which there may be found in the body of the sentence matter which would show that it was not entitled to credit. This, however, is not the case here. What I have to look at here is, whether it is established by proper evidence that the judgment was obtained by collusion and fraud. The circumstances relied on were a bond and a conversation. I cannot find any thing in either to show the vice of fraud and collusion. The parties found themselves at the time of the suit in an embarrassing situation, not knowing whether the marriage was valid or not. They had to decide between two courses: whether to have it then completed regularly, or to have it declared that the relation of marriage did not subsist. They had a right to have their *status* determined. I cannot hold that there was any thing fraudulent in the contemplation of the suit. Having a right to have their *status* determined and to have a suit instituted for that purpose, there is nothing in the bond or conversation from which to infer fraud or collusion. As to the question of hardship, it would be a greater hardship to upset, than to confirm, the sentence. For fifty years the sentence has been without question, and parties may have married again and relations may have sprung up which it would be a much greater hardship to interfere with. I must disallow this exception, and this will dispose of this case.

 DRAKE v. WEST.¹

February 26, 1853.

Injunction — Jurisdiction — Illegal Distress.

Where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction, to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment.

THIS was a motion *ex parte* for a special injunction to restrain the defendant, his bailiffs, brokers, agents, receivers, attorneys, solicitors, servants, and others authorized or employed by him, from distraining upon or taking, or carrying away the goods of, or otherwise molesting, annoying, or interfering with the tenants of certain leasehold messuages and premises, comprised in an indenture of assignment of the 31st of May, 1852, or any or either of them.

The bill stated, amongst other things, as follows: — By the above indenture the defendant and others assigned to the plaintiff, in con-

¹ 22 Law J. Rep. (N. S.) Chanc. 875.

Drake v. West.

sideration of 260*l.*, certain leasehold messuages (ten in number) for the respective residues of the several terms, for which the same were respectively held by the defendant. On the execution of the assignment, the balance of the purchase-money was duly paid, and the plaintiff entered into possession and received the rents, without interruption, until the month of December following, when the brother of the defendant filed a plaint in the Shoreditch County Court, against the plaintiff, for the recovery of one half of the rents received by him since the assignment, but was nonsuited. On the 18th of January following, the whole of the tenants of the houses assigned to the plaintiff were distrained upon for alleged arrears of rent, under warrants signed by the defendant; some of the tenants paid the sums demanded, but others refused, and their goods were removed by the defendant's broker and his bailiff. The defendant excused himself to the plaintiff for having signed the warrants, on the plea of drunkenness, and the plaintiff, on the 22d of the same month, gave written notice to the defendant, his broker and bailiff, of the assignment of and of the due payment to him of the rents by the tenants, and that unless the money taken from the tenants should be returned, proceedings would be taken by the plaintiff; but notwithstanding the notice, the tenants were, on the 22d of the same month, again distrained upon by the same person. One of the tenants then summoned the broker and bailiff for illegal distress before a police magistrate, who ordered the latter to pay a certain sum or return the goods of the summoning tenant, and pay the costs of the application, which, however, they had not done when the bill was filed. On the 4th of February following, the tenants were again distrained upon for rent alleged to be then due to the defendant, under warrants signed by him. The bill also stated that the tenants were all weekly tenants, in humble circumstances, and would quit the houses if the distresses were continued; that the plaintiff would be unable to obtain other tenants, and would be thereby deprived of all income from the premises, and sustain great and irreparable injury, and that the defendant was possessed of little or no property, and was not capable of answering in damages for the injury sustained.

The bill prayed that the plaintiff might be quieted in his possession of the premises assigned, and for an injunction in the terms of the notice of motion.

Sheffield, for the motion.

Woon, V. C., said it was not a case for the interference of a court of Chancery. The relation of vendor and purchaser had ceased on the legal assignment of the premises by the defendant to the plaintiff: and the case of the plaintiff was not analogous to those in which a bill of peace had been filed after the title to the property had been established by ejectment or repeated actions at law. The defendant's proceedings might be illegal and annoying to the plaintiff, but the lords justices had decided in the recent case of *The Sheffield Gas*

Everall v. Browne.

Companies,¹ that the plaintiffs in that case were not entitled to ask for an injunction, although the defendants had, without any authority and to the annoyance of the inhabitants, taken up whole streets for the purpose of laying down gas pipes.

EVERALL v. BROWNE.²

February 21, 1853.

Will — Construction — Articles ejusdem generis.

A testator, by his will, gave the residue of his personal estate to A, B and C, to be equally divided by them. By a codicil, he gave A the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil, he revoked the bequest made to B by his will :—

Held, that the gift to A, by the first codicil, was a general one, and that the words "property, goods, and articles" were not to be confined to articles *ejusdem generis* with clothes, and that, consequently, A was entitled to two thirds and C to one third of the residue.

ROBERT CRACROFT, by his will, dated the 5th of March, 1830, gave several specific and pecuniary legacies. The will then proceeded as follows :—" And I then request and empower the said Edward Browne to lay out the whole of the residue of my property, which I hereby empower him to sell for that purpose, in the purchase of three annuities, if practicable, from the Governor and Company of the Bank of England, in any manner or way which the said Edward Browne may think proper, for and during the lives of my brother, C. W. Cracroft, Rebecca Nash, and a little girl, the daughter of the said Rebecca Nash: the said three annuities to be purchased to bring in an annual income of equal amount to each during each of their respective lives as nearly as the same can be practicable; the manner of purchasing the said annuities I leave entirely to the knowledge and judgment of my said friend and executor, Edward Browne, Esq.

The testator made three codicils to his will. The first did not affect the question of his residue. The second was dated the 6th of March, 1830, and was as follows :—

"I will and bequeathe the amount of any salary due to me by his Majesty's government at the time of my decease, also any arrears of rents for my property in Wales or elsewhere unto the said Rebecca Nash; and it is my wish to be buried in as humble but decent manner as possible. I also bequeathe all my clothes and any other pro-

¹ *The Attorney-General v. The Sheffield Gas Consumers' Company; The Sheffield United Gas-Light Company v. Same*, (not yet reported.)

² 22 Law J. Rep. (N. S.) Chanc. 376.

Everall v. Browne.

perty, goods, and articles belonging to me at the time of my decease, unto the said Rebecca Nash."

The third codicil was dated the 24th of January, 1832, and was as follows:—"This is a codicil. I hereby exclude my brother, C. W. Cracroft from any participation in the annuities I have before named, and hereby deprive him of all and every right or benefit to any part of my property or effects whatsoever that I may be in possession of or entitled to at the time of my decease."

The testator died soon after the date of the last codicil, leaving Rebecca Nash, who afterward married Mr. Everall, and Ann Rebecca, the child of Rebecca Nash mentioned in the will.

The bill was filed by Mr. and Mrs. Everall against the persons claiming to be interested in the personal estate of the testator, for the purpose of obtaining the opinion of the court as to the effect of the above will and codicils.

Sidney Smith, for Mr. and Mrs. Everall, the plaintiffs, contended that the effect of the second codicil was to give to them every thing that was not disposed of by the will as qualified by the third codicil. The gift in the second codicil was a general one, and the words "property, goods, and articles," were not to be narrowed and confined to articles *ejusdem generis* with clothes. He cited *Kendall v. Kendall*, 4 Russ. 360; *Arnold v. Arnold*, 2 Myl. & K. 365; *Boys v. Morgan*, 3 Myl. & Cr. 661; *Parker v. Merchant*, 1 You. & C. C. C. 290.

• *W. P. Murray*, for the next of kin, contended that the words "property, goods, and articles," were to be confined to articles *ejusdem generis* with clothes. He cited *Timewell v. Perkins*, 2 Atk. 102. If it were not so, the second codicil would have the effect of giving every thing to Rebecca Nash, and revoking the gift in the will to her daughter, which could not have been the intention of the testator.

Vance, Fooks, Osborne, Wickens, and Shapter, for other parties.

STUART, V. C., said that, by the will, all the residue was, in effect, given to three persons, of whom C. W. Cracroft was one. [His Honor then read the second and third codicils.] It had been stated that, if the second codicil was to have the effect of giving the residue generally to Rebecca Nash, it would amount to a gift to her of every thing, and destroy the will. He could not so regard it. The will would be at any rate good as to the gifts to Rebecca Nash and her daughter. On looking at the will and the three codicils together, he found that there was something undisposed of, that is, the share given by the will to C. W. Cracroft. On this the second codicil would operate, and so have effect given to it. Hence the plaintiffs would have two thirds and the daughter one third of the residue.

 Blaikie v. Clark. Cock v. Clark.

BLAIKIE V. CLARK. COCK V. CLARK.¹

March 11 and 12, 1852.

Annuity — Separate Estate — Feme Covert — Medical Attendant — Undue Influence — Rectifying Settlement.

An assurance company, through B., the medical attendant of a married woman, who was also the trustee of the deed made upon her separation from her husband, purchased of her, with a knowledge of these facts, four annuities: each of these was secured by B.'s warrant of attorney, and also by her conveying to trustees for the company the rents of certain real estates settled to her separate use. B. received, if not the whole, certainly very large benefits from the transactions:—

Held, that these purchases were valid; that she had competent advice; that the transaction was fully explained to her; that she knew it was a purchase for value, and that the rents of her estate were made liable for the payment, and that she was not subject to coercion or undue influence, and that the rents of the settled estates were applicable to the payment of the annuities.

Held, also, that the court in its discretion, under the 53 Geo. 3, c. 141, s. 6, could direct allowance to be made to her in account for sums deducted from the purchase-money for the last two annuities for insuring the life of B. the medical attendant, and for compound interest upon the arrears of the previous annuities, and that such deduction did not invalidate either of the last two transactions.

A marriage with a ward of court, a tenant in tail of real estates, took place without consent; proposals were made under various orders of the court, that the personal and real estate of its ward should be settled, and that the income should be secured for the separate use of the wife. A deed of covenant was afterwards executed by the husband, and the income of the personal and real estates was to be paid to the wife for life for her separate use, with a provision against anticipation as to the personal estate, which was omitted as to the rents of the real estate. The deeds executed to bar the entail and re-settle the estates, according to the proposals, were informal, and the wife alleged that she executed them under duress, and for fear of an attachment. The wife separated from her husband and charged the rents of the estate with the payment of several annuities, after which the husband died. Upon a bill by the wife to rectify the settlement and obtain payment of the rents:—

Held, that the wife having dealt with the property upon the footing of the settlement was so far bound; and that, assuming there was a mistake, the court would not assist her to defeat transactions *bonâ fide* entered into with third parties on the faith of the settlement being correct; and the cross bill was dismissed, but without costs.

THE suit of *Blaikie v. Clark* was instituted on the 31st of March, 1849, by Thomas Blaikie, David Chalmers, Alexander Stronach, and John Webster, on behalf of themselves and the other members of the Aberdeen Assurance Company, against Henry Clark, Robert Smart, and Clarissa Cock, to obtain a schedule of deeds and accounts; and to have the trusts of four several deeds, dated the 10th of April, 1844, the 29th of November, 1845, the 25th of April, 1846, and the 10th of June, 1847, granting to the plaintiffs four several annuities of 192*l.*, 118*l.*, 80*l.*, and 100*l.*, and charging the same upon the rents and profits of the manor, rectory, and tithes of Cherry Willingham, in the county of Lincoln, and the estates thereunto belonging, carried into execution; and asking for an account of what was due on the several

¹ 22 Law J. Rep. (N. S.) Chanc. 377.

Blaikie v. Clark. Cock v. Clark.

annuities, and for the costs, charges, and expenses which they had been put to, with interest upon the arrears from the respective times of their falling due; and asking for an account of the rents and profits of the real estates, and for payment, or that Messrs. Clark and Smart might make good the deficiency; and asking also for an account and sale of a sufficient part of the rents, &c., and premises comprised in and assigned by the four several deeds, or intended so to be, to make good what should be found due, or so much thereof as the amount to be made good by Messrs. Clark and Smart should be insufficient to pay; and it also asked for an injunction and receiver.

The suit of *Cock v. Clark* was instituted, on the 3d of August, 1849, by Clarissa Cock against Messrs. Clark and Smart, and against the plaintiffs in the first suit, and her son Charles Foxon Cozens Cock, to obtain a declaration that certain deeds executed on the 27th and 28th of June, 1838, were void, and that she was tenant in tail of the real estates at Cherry Willingham; or if the deeds were not void, that she might be declared entitled, and that the rents and profits and also the dividends of 6,129*l.* 9*s.* 7*d.* consols, due, and to accrue due, might be paid to her; and that, if necessary, the deed of the 28th of June, 1838, might be rectified so as to provide for the payment of the rents and profits of the premises to the plaintiff for her separate use without power of anticipation during her coverture, and, in either case, that the annuity deeds might be declared void against the plaintiff. It also asked for an account and payment to her of the rents, profits, and dividends received by her trustees, or which, but for their wilful default, they might have received; and it also asked for an injunction and receiver.

The bill in *Blaikie v. Clark* stated that the Aberdeen Assurance Company consisted of the plaintiffs and upwards of 500 copartners; and that by indentures of lease and release, bearing date the 27th and 28th of June, 1838, and made between John Seymour Cock, since deceased, and Clarissa, his wife, and Henry Clark and Robert Smart, a moiety of the manor, rectory, tithes, and estates at Cherry Willingham was, in pursuance of a covenant entered into by Mr. and Mrs. Cock with the trustees on the 8th of June, 1831, conveyed to Messrs. Clark and Smart, and their heirs, for the life of Clarissa Cock, to support contingent remainders, and to receive the rents and pay the same as they should become payable during the life of Clarissa Cock, unto such persons as she should appoint, and in default thereof into her own hands for her separate use exclusive of her husband, with remainder after her decease to the uses therein mentioned.

By an indenture, dated the 28th of April, 1842, in consideration of 1,500*l.* paid with the consent of David Boast, Clarissa Cock granted to Thomas Holt an annuity of 150*l.* payable quarterly, during her life, out of the rents and profits thenceforth to arise out of the settled estates, and out of the dividends of 6,129*l.* 9*s.* 7*d.* consols; and she appointed and assigned the settled estates to William Stafford, his executors, administrators, and assigns, during her life, upon trusts for the more effectually securing the annuity; and she also appointed and assigned the dividends thenceforth during her life to accrue due

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upon the sum of 6,129*l.* 9*s.* 7*d.* consols, unto William Stafford, his executors, administrators, and assigns, upon trust for more effectually securing the payment of the annuity.

In April, 1844, Messrs. Blaikie, Chalmers, and Webster, on behalf of the Aberdeen Assurance Company, agreed with Clarissa Cock for the purchase, during her life, of an annuity of 192*l.* for the sum of 2,500*l.*, out of which 1,552*l.* 12*s.* was paid to T. Holt, and the remaining 947*l.* 8*s.* was paid to her; and by an indenture, dated the 10th of April, 1844, and made between Clarissa Cock, then the wife of J. S. Cock, of the first part, David Boast of the second part, Messrs. Blaikie, Chalmers, and Webster of the third part, Thomas Holt of the fourth part, W. Stafford of the fifth part, and James Davidson of the sixth part, Clarissa Cock granted to Messrs. Blaikie, Chalmers, and Webster, as trustees for the Aberdeen Assurance Company, an annuity of 192*l.* payable quarterly, during her life, and she appointed and assigned to them the rents and profits to arise during her life. In respect of the settled estates, upon trusts to secure the payment of the annuity: one of which was, that in case default should be made in payment of the annuity for twenty days, it should be lawful for them to receive the rents, &c., and after payment of the costs to pay themselves the annuity of 192*l.* and all additional premiums of assurance, and then to pay unto Mrs. Cock what should not then be requisite for satisfying the purposes specified. By the same deed, the annuity of 150*l.* granted to T. Holt, and the securities for the same, were assigned upon trust for further securing to Messrs. Blaikie, Chalmers, and Webster, the annuity of 192*l.*

By an indenture, dated the 29th of November, 1845, and made between Clarissa Cock of the first part, David Boast of the second part, and Messrs. Chalmers, Stronach, and Webster, of the third part, Mrs. Cock, in consideration of 1,500*l.*, granted to them an annuity of 118*l.*, payable quarterly, during her life, and assigned the rents and also the settled estates out of which the same issued, to secure the payment as she had previously done for securing the annuity of 192*l.*

By two subsequent indentures, dated respectively the 25th of April, 1846, and the 10th of June, 1847, made between the same parties and similar in all respects to the last, Clarissa Cock, in consideration of 1,000*l.* and 1,000*l.*, granted to Messrs. Chalmers, Stronach, and Webster two several annuities of 80*l.* and 100*l.*, payable quarterly, during her life.

Memorials of the whole of these deeds were duly enrolled, pursuant to the 53 Geo. 3, c. 141, and notice of each deed was given to Messrs. Clark and Smart.

On the 16th of September, 1847, J. S. Cock died.

On the 16th of March, 1847, the plaintiffs informed Messrs. Clark and Smart that the annuity of 192*l.* was in arrear, and requested that the rents of the estates might be paid to the solicitors of the company; but afterwards C. Cock paid a further sum of money to the plaintiffs, which satisfied all the annuities up to the 21st of July, 1847, but no subsequent payments were made; and Messrs. Clark

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and Smart allowed Mrs. Cock to receive the rents of the settled estates, notwithstanding the request made to them on behalf of the plaintiffs.

The bill then charged that Mr. Stafford acted as her solicitor when the first annuity was granted, and that she refused to employ any solicitor upon the last three transactions, but that she perfectly understood them, having been informed of their effect by Mr. Davidson, the solicitor of the company.

The bill then charged that the whole of the sums had been paid to Clarissa Cock, and that no part of the money had been paid to David Boast at the time of the execution of the deeds, or while she remained in the office of the solicitors of the company or with their privity, but that she had made advances of money to Mr. Boast to enable him to improve a farm he had taken. From the beginning the annuities seemed to have been paid irregularly, and the solicitors of the company wrote to Mrs. Cock :—

“November 4, 1844.”

“Madam, — We beg to inform you that the quarterly payment of your annuity, namely, 48*l*., was due on the 21st of October last, and have moreover to intimate that in consequence of the irregularity with which the payment is generally made, it is our intention to avail ourselves of the remedies granted by your deed, should any such irregularity be pursued in future. Yours, &c.

CLARK, DAVIDSON & BROWN.”

They subsequently wrote a similar letter :—

“November 14, 1846.

“Madam, — We think it right to inform you that there are now due to the Aberdeen Assurance Company two quarterly annuities, and we regret to add, that our instructions are peremptory to enforce the powers in the annuity deeds. Unless, therefore, these arrears are paid in the course of Wednesday, we shall be under the necessity of giving notice to the trustees to pay the rents and profits of the premises mortgaged, to the company, in future. We are yours, &c.

CLARK & DAVIDSON.”

It did not appear that any answer was made to these, but Mrs. Cock afterwards wrote to Mr. Davidson :—

“August 2, 1847.

“Dear Sir, — I regret I shall not be in a position to pay the annuity for about a fortnight. This circumstance has produced me much uneasiness, but I have not on this occasion been able to prevent it. I trust the delay will not be of much consequence to you. Mr. Boast intended to have been with you on Tuesday respecting it, but was prevented getting to town. Yours, &c.

CLARISSA COCK.”

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She again wrote : —

" September 5, 1847.

" Dear Sir, — Since I wrote last, I have been under the necessity of living some time in the West of England, in consequence of the bad state of health of Mr. Cock, who has returned with me, and is not expected to live many days — it is impossible for him to recover. This affair has put me to much expense and disappointment in realizing some other cash, and has prevented my settling with you, but I certainly shall do so shortly, and I trust, under these circumstances, that no expense will be incurred in this matter. Had it not been for this I should have paid before now. I am, &c. CLARISSA COCK."

The bill then stated that Clarissa Cock insisted that the settlement of the 28th of June, 1838, as it was made under the direction of the court and in pursuance of the deed of covenant executed by her husband, ought to have secured the rents and profits and income for her separate and inalienable use during her coverture. The bill then charged that J. S. Cock and his wife executed the settlement, and that she acknowledged it, and that it was afterwards enrolled; that Clarissa Cock being a ward of court, married while an infant, upon which, on the 17th of November, 1830, a reference was directed to the Master in a suit of *Foxon v. Foxon*, who, by his report, which was afterwards confirmed, had approved of a proposal to settle, after various deductions, the residue of 9,048*l.* 7*s.* consols, part of the property of C. Cock, by placing it in the names of trustees, upon trust to pay the dividends to C. Cock for her sole and separate use for life, and that John Seymour Cock had proposed to enter into a covenant, when his wife attained twenty-one, to join with her in barring her estate tail in the real estates, and in conveying them to trustees, for the life of C. Cock, upon trust to pay the rents, &c. to her for her life, for her separate use.

That on the 8th of June, 1831, a deed was executed by J. S. Cock and his wife, by which the residue of the sum of 9,048*l.* 7*s.* 3*d.* consols, was assigned to Messrs. Clark & Smart as trustees, upon trust to pay the dividends to such person, during the life of C. Cock, as she, notwithstanding her coverture, and as if she was sole and unmarried, should, but not by way of anticipation, appoint, and in default thereof into her own proper hands for her separate use. And J. S. Cock for himself, his heirs, &c., and for his wife, covenanted that they would suffer a recovery of the moiety of the estates of which his wife was tenant in tail, and convey the same to Messrs. Clark and Smart, upon trust, during the life of Clarissa Cock, to pay the rents, &c., to such person as she should, notwithstanding her present or any future coverture, appoint, and in default thereof, into her own hands, for her separate use.

The bill then charged that the Master's report ought not to have contained any provision restraining C. Cock from disposing of, or charging by anticipation, the interest, dividends, and annual produce, during her life, to accrue on the consols comprised in the indenture

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of the 8th of June, 1831, and that the provision contained in the same indenture, and the covenant of the said J. S. Cock, ought not to have provided that C. Cock should be restrained from disposing of, or charging by anticipation, the rents and profits during her life to arise or accrue due in respect of the estate covenanted to be settled. That previous to the grant of the annuity, Messrs. Clark and Smart produced the indenture of settlement of the 27th and 28th of June, 1838, to the solicitors of the company, in compliance with the following letter which was written to them by Mrs. Cock:—

“March 20, 1834.

“Gentlemen,—I shall be obliged if you will allow Messrs. Clark, Davidson, and Brown to inspect the indenture of settlement of the 27th and 28th of June, 1834. I am, yours, &c. C. Cock.”

The indentures of lease and release were prepared in 1834, and were tendered to C. Cock for acknowledgment and execution, but she declined to execute the deeds; and the Master of the Rolls, on the 3d of December, 1835, first, and afterwards the Lord Chancellor, on the 27th of April, 1836, refused to make any order to compel her to execute the deeds, but that she afterwards executed the same deeds on the 27th and 28th of June, 1838, and again, in consequence of an informality, on the 27th and 28th of October, 1841, and they were enrolled on the 3d of November, 1841.

The bill also charged that C. Cock ought not to be allowed to set up any proceedings in the suit of *Foxon v. Foxon*, of which the plaintiffs had not notice previous to the date of the several securities, to the prejudice of the plaintiffs or the company.

Mrs. Cock, by her answer, said, that on the 27th of September, 1830, the time of her marriage, she was a ward of court, under twenty-one years of age, and that the income of her property was to have been settled to her separate use; that she was tenant in tail of the real estates, and that the real effect of the proceedings in the suit of *Foxon v. Foxon* was, that the estates were to have been settled upon her for life, and were to be inalienable during the coverture, and that it was the duty of the trustees to have seen that done; that the settlement was not duly acknowledged, and was not enrolled until the 3d of November, 1841; that, at the request of Mr. Boast, she, in the lifetime of her husband, executed certain deeds, but that no money was paid or tendered to her, save on the last occasion, when Mr. Davidson held out to her a 1,000*l.* note, and said, “it is a mere matter of form,” and that upon her saying, “you never did that before,” he withdrew it, and handed to Mr. Boast a debtor and creditor account, claiming 331*l.* 16*s.* 2*d.* for arrears of annuities; that she had learnt that he had deducted that amount, and paid only 668*l.* 3*s.* 10*d.* to D. Boast; that the consideration for the whole of the annuities was paid to D. Boast, who negotiated the whole of the transaction, and was the contracting party, as on each occasion he had executed warrants of attorney to secure the payment of the annuities upon

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which judgment had been entered up and execution issued; that she had only been required to join as a surety for Mr. Boast, but that the plaintiffs subsequently resorted to her for payment, though they knew that she was not to derive any benefit; that the plaintiffs procured and were privy to D. Boast getting her to execute the deeds, though she did not understand and had not the means of understanding them; that none of the deeds or any draft of them were ever perused by any solicitor on her behalf, neither were they explained to her, save that the first was read in the office of Mr. Stafford, the solicitor of Mr. Holt, whose deed she also questioned, but that she did not understand it, and did not think it necessary that she should, as she never had any intention that the deed should affect her income under the settlement, and never thought it would be affected during her coverture; that the plaintiffs had notice of all the deeds and orders under the suit of *Foxon v. Foxon*; that she had only lately been informed that, when she executed the deeds, divers sums of money had been deducted from the sums paid to Mr. Boast; that in 1847 she had lent him half a year's rents, 315*l.* 8*s.* 7*d.*, which he sent to Mr. Davidson, and that she subsequently lent him 108*l.* 14*s.*, all which he had repaid.

The bill in *Cock v. Clark* stated the whole of the orders in *Foxon v. Foxon*, and the deeds executed under them, including those of the 27th and 28th of June, 1838; that D. Boast was a surgeon and the medical attendant of Mrs. Cock's family; that he had negotiated the separation between herself and her husband in 1836, and was a trustee of the separation deed, and as such was in the habit of receiving the plaintiff's income or portions thereof, and of paying to her husband an annuity, secured to him by the separation deed, and that from his position in her family he had great influence over her; that he had induced her to execute the annuity deeds, without her understanding them, and that he was never employed and never acted as her agent to negotiate or sell any annuity, or for any like purpose, and that she derived no benefit from the purchase. It then reiterated the statements of the retention of parts of the consideration money for the annuities, and insisted that they did not affect her life interest, and that the estate ought to be considered as settled to her separate use inalienably, and so that she could not sell or anticipate the income, and that the deeds of the 27th and 28th of June, 1838, were ineffectual to pass her interest in the estates, inasmuch as they were prepared in 1834, and were ineffectually executed in 1838, and were not properly acknowledged, and were not enrolled until the 3d of November, 1841.

Stuart, Lloyd, and Pirie, for the plaintiffs in the suit of *Blaikie v. Clark*.

Elmsley and Piggott, for Messrs. Clark and Smart, insisted that they were not responsible for the rents which had been received by Mrs. Cock, after notice to them, and that they had not committed any breach of trust.

R. Palmer and Cairns, for Mrs. Cock. There are two legal de-

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fences to this suit and two equitable : the legal grounds are, first, that the deeds conveying the estate to the separate use of Mrs. Cock are void, and that she is now tenant in tail of those estates ; and, secondly, that the annuities are void under the 53 Geo. 3, c. 141, and particularly the last two, on the ground that a portion of the consideration was retained. The suit of *Cock v. Clark* is for a rectification of the settlement. The equitable grounds of defence are, that the whole of the transactions were a fraud committed by Mr. Boast on this lady ; he was a trustee of the deed of separation between her and her husband ; he was also her private medical adviser, and she resided in the same place with him ; the complainants were aware of these circumstances, and at the request of Mr. Boast they advanced money to him for his own purposes ; and in order to induce her to execute the deeds, he told her that some remote interest only under the settlement would be affected by the security. Mr. Davidson, from the beginning, had a full knowledge of all these circumstances. Upon the last two transactions large deductions were made from the consideration money, and on each occasion they took both covenants and warrants of attorney from Mr. Boast to secure the payments ; they entered up judgment upon the latter, and it was not until they found Mr. Boast insolvent that they applied to Mrs. Cock. The transaction with Mr. Holt was similar in all respects to those that followed ; there was, however, an end of that. The whole of the deeds purport to charge the income in the funds which she could not anticipate : the deeds could not affect them, and it was but reasonable for Mrs. Cock to suppose that they could not affect the rents and profits of the real estate. As to Mr. Stafford, he was the solicitor of Mr. Holt ; his interest was to get what was due to him. Was he likely to say, " this is a transaction you ought to inquire into ? " It was irreconcilable with his duty to Mr. Holt. There should have been some disinterested person to advise her, that the power to anticipate was doubtful ; but had he done this, he would have destroyed the deed he had previously prepared for Mr. Holt. When requested by Mr. Boast, the solicitors of the plaintiffs refused to act for Mrs. Cock, but they readily acquiesced in the appointment of Mr. Stafford, who was in precisely the same position as themselves. It is most important to know precisely what the nature of his explanation to Mrs. Cock was : had he been present upon the subsequent transactions he would, no doubt, have said she understood each, but the circumstance of her having executed a previous deed is no reason why a solicitor should be dispensed with upon the last three transactions. It was upon each of these that declarations were required from Mrs. Cock ; she was made to declare, under the 5 & 6 Will. 4, c. 62, that she had executed no deeds but those mentioned, without knowing what in such declaration was stated to be the effect of such deeds. Upon the third transaction they deducted from the consideration not only the arrears of the previous annuities, with interest, but also the premium for insuring the life of Mr. Boast, and the charges of the plaintiffs' solicitor. It is clear that Mr. Boast was the principal in the transaction, and that they looked to him for payment ; and that the insurance company was not content with

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insuring the life of the *cestui que vie*. Upon the fourth transaction Mr. Davidson produced a similar account and made similar deductions. But a party in a fiduciary position, who sets up any advantage to himself as against a woman, must prove that it was entirely voluntary, and that every assistance was given to her; and this principle applies equally to a third party, who was aware of the fact that he was dealing with a party possessing great influence in consequence of a fiduciary and confidential position, who was to derive a benefit from the transaction. *Archer v. Hudson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 437; *Cook v. Lamotte*, 21 Law J. Rep. (n. s.) Chanc. 371; s. c. 11 Eng. Rep. 26. The general principle is stated in *Hunter v. Atkins*, 3 Myl. & K. 113; and Mr. Boast comes within the class referred to. The last two annuities must be void under the 53 Geo. 3, c. 141, s. 6. Deductions were made for arrears and previously existing debts. *Williamson v. Goold*, 1 Bing. 234, 316; s. c. 7 B. Moore, 579; 8 B. Moore, 109; *Gorton v. Champneys*, 1 Bing. 287; s. c. 8 B. Moore, 302. The acts of an agent ought to be before the court, and any money coming to him is a return within the meaning of the act. *Henry v. Taylor*, 3 Bing. 177. Then, again, the deeds disentailing the estate are void for want of enrolment, and passed no estate. 3 & 4 Will. 4, c. 74, ss. 15, 40, 41, 77; and but for the act, she had no power to convey. So far as it was the act of the husband it was good, but the parties here are entitled to treat as a nullity that which can have no operation in law. *Shep. Touch.* 60. The husband's act, apart from his wife, is altogether informal, so that the estate tail remains in his wife. Will the court, then, rectify the settlement? Mrs. Cock was a ward of court. The husband made proposals for a settlement which, as regarded the income of the real and personal estate, were identical. The court approved of the proposals; but the deed of the 8th of June, 1831, introduced the distinction. The reference to the Master was to settle a deed in pursuance of the proposals, and this settlement was executed under duress arising from fear of an attachment. The deeds, therefore, ought to be rectified.

Dent v. Bennett, 7 Sim. 539; *Ahearne v. Hogan*, Dru. 326.

THE MASTER OF THE ROLLS. There are four grounds stated for the relief sought in the cross-suit. Two are legal and two are equitable; and one of the equitable grounds which has been principally argued is, that there is reason for setting aside this transaction on the ground either of fraud or misrepresentation, or of undue influence, of which the company had notice. The burden of proof undoubtedly, in a case where one person gains a great advantage over another by any thing which is in the nature of a voluntary instrument, throws upon the person who receives that benefit the necessity of showing that it is a fair and honest transaction; and though this court never prevents one person from being the object of the voluntary bounty of another, yet it must be shown that the bounty was purely voluntary, and not affected by any undue influence, coercion, or misrepresentation. This transaction, on the face of it, is a purchase for valuable consideration. It is a purchase by the plaintiff of an annuity from

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the defendants, or rather, from the plaintiffs in the first suit, by the plaintiff in the second suit. On the form of the transaction, therefore, it is like any other purchase for value; and the person who says that it was unfair, or a transaction in which the person who sells the annuity ought not to be bound, is bound to impeach it; the burden of proof, therefore, in the first instance, lies on the plaintiff, Clarissa Cock. It may happen that evidence may be given to shift that burden and throw it upon the plaintiffs in the first suit, to show that it is a valid and *bona fide* transaction; but fraud and misrepresentation by the plaintiffs is not alleged or attempted to be proved. The case made, is, that Mr. Boast was a person placed in such a relation towards the plaintiff, Mrs. Cock, that he had an undue influence over her, and could persuade her to join with him in a transaction beneficial to him and to the Aberdeen Assurance Company, and that the company having notice of that were bound not to take any advantage, but to see that any thing this lady did was done free from any influence, and with a deliberate and clear knowledge of what she was about.

The cases of *Archer v. Hudson*, and *Maitland v. Irving*, establish that, in a transaction in which all the parties gain an advantage at the expense of the volunteer, it is the bounden duty of the persons who gain that advantage to show that the volunteer fully and completely understood what he was about; but neither *Archer v. Hudson* nor *Maitland v. Irving* were cases of a purchase for valuable consideration; they were cases in which the money had been already lent to the original debtor by the creditor; who, finding the security imperfect, gains a distinct and manifest advantage from the silence and junction in the security of the volunteer, who gains no benefit. Without, therefore, saying that they would not, the same observations do not apply in the case of a *bona fide* purchase in the first instance, for value, because a person gains no advantage by a purchase, if fair, and would abstain from making it unless the party, to give validity to the transaction, had thought fit to join; it is very different from *Archer v. Hudson* and *Maitland v. Irving*. In the latter case the bankers, who were the defendants, had said to Mr. Donald Maclean, "We will not advance this money to you unless Miss Maitland will join as your security," and they, knowing the relative position of guardian and ward, afterwards took advantage of her being persuaded by him to join in the security to them. I do not say the court would not act in the same way in both cases; but there is a difference, to the advantage of the persons who have advanced their money on this security. The distinction is obvious between a person who advances his money upon a security contracted for, and a person who joins with the debtor, and says, "I will not advance the money unless you give me good security;" in the last case, if the surety were connected with or related to the party, and this was known, it might set aside the transaction, unless it could be shown that the person who advanced the money had previously thought it his duty to inquire into all the possible relations between those persons. I think, therefore, there is a plain distinction between the two cases.

I assume this to be a simple case in which the transaction is for

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adequate value, and leave out of consideration any questions relating to notice generally. Looking at this case as annuity transactions are generally regarded in this court, it does not appear that any inordinate amount of interest was obtained: something under 8*l.* per cent. was the total amount; and against that must be put the premium for insuring the life of the *cestui que vie*; it is manifest this is not one of those cases which the court is frequently compelled to support, though it does so reluctantly because it sees that advantage has been taken of the grantor of the annuity. But, assuming it established that Mr. Boast was the real person who benefited by this transaction, and who received the money from the assurance company, — and assuming it also established, which I think it is, that either the assurance company knew, or ought to have had presented to them, and had the means of knowledge within their own power, that this gentleman was the confidential medical adviser of this lady, and also that he was her intimate friend and managed her affairs, it does not appear to me that this lady was under such a degree of influence from Mr. Boast as to make her incompetent to act in a matter which he disapproved of, or in which she would have acted as a woman having a distinct and separate power of judging for herself as if she were a *feme sole*. I have not observed any such evidence, and certainly not if the evidence of Mr. Boast is taken into consideration. Even if all those points were established, the court does not forbid a person in the situation of Clarissa Cock from doing that which she might think fit to do deliberately with her eyes open, when the act is not influenced by any other person.

In this case, the evidence establishes that upon the first transaction she knew distinctly what she was about. Mr. Stafford acted as her solicitor; it is stated that he acted also as the solicitor of Mr. Holt and Mr. Boast; and it is stated that his interest as solicitor of Mr. Holt was opposed to hers: but I am not clear that it is so. If the annuity to Mr. Holt was a good and *bond fide* annuity, and one that could not be impeached, it is by no means clear that Mr. Holt might not have preferred the annuity to be continued. He got a much larger amount of interest for his money than the assurance company paid; for he got 10*l.* per cent. Mr. Holt thought his security was valid, and that it could not be impeached, and Mr. Stafford was of the same opinion; and the result is, that the interests of all parties to this transaction were not opposed, and Mr. Stafford asserted in the most unequivocal manner, in his evidence, that he distinctly and deliberately explained every part of the transaction and every part of the deed to this lady. It was not merely read over to her: the reading a deed to a person not acquainted with legal matters is never so satisfactory as an explanation. A deed may be read to unlearned persons, without their understanding much about it; and it frequently happens, even to the court, when a clause in a deed is read, that it is some time before the effect can be comprehended even with the aid of counsel, who are daily found to be of the utmost assistance to the court. But he distinctly says that he explained the deed. It was not very difficult of explanation: the only fact to be

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ascertained was, were the rents of her estate to be made immediately liable for the payment in case Mr. Boast did not pay the annuity? The deed is clear and distinct upon the subject; and Mr. Stafford could not have explained it to this lady unless he had explained to her that which was perfectly intelligible; and he could not have omitted it and give the evidence he has done, without being perjured. I have no doubt, therefore, that Mr. Stafford speaks the truth. He had no motive or interest, and unless it was contradicted by other circumstances, I should not doubt the evidence of a witness—a respectable witness—who comes forward to testify to a matter of this description.

Mr. Boast's evidence is to this effect, and is of the most singular description. He states that he did explain the whole matter to her, and to the same effect, as appears by the evidence of Mr. Stafford; but that he told her that, by a rule of law, she being a married woman, this would be a mere delusive security to the assurance company, and that they could not make her estate available; so, that she understood the matter, as it appeared on the deed, is perfectly confirmed by Mr. Boast's evidence. But if I am to believe the whole of his evidence, which I shall be very reluctant to do, it would be that he had induced her to believe that, by joining with him, they could, in fact, commit a fraud upon the assurance company, and under color of giving security, give no security at all. If that were the transaction, I should not think she was entitled to much assistance from this court.

But the rest of the transaction confirms me in the view that she understood its nature; for not only do the two letters from Mr. Davidson, of the 4th of November, 1844, and the 14th of November, 1846, on the application for payment of money, expressly state that her rents are to be applied, but they seem to have caused no surprise whatever in her mind; nor do her letters of the 2d of August and the 5th of September, 1847, express any surprise at her being called upon to pay the annuity, but they clearly express a desire to have some time for the purpose of being enabled to do so. The debtor and creditor account which contains an account of the transaction before the fourth annuity was granted, showing that a sum of 315*l.* 8*s.* 7*d.* was paid with her consent from the tenants to the assurance company, also seems to confirm that view of the case. There is no distinct evidence of the time when this document came into her possession, but she must then have known that contemporaneously with this document sums of money were paid to Mr. Boast; she must have seen that it was not consistent that the money should have been paid to the assurance office, as money paid by the assurance office, to Mr. Boast. Her own statement respecting this transaction, in her answer, where she speaks of supposing that she was to be the surety, also confirms the other view of the case. Upon the result of the evidence, I have arrived at the conclusion that this lady knew and understood what she was about when she executed the annuity deed in 1844. It also appears that a distinct and separate solicitor was employed for her in the annuity previously granted; and I have no

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doubt if that annuity had been in contest in this suit, it would not have been possible to impeach it, provided there was nothing else than what appears before me.

With respect to the three subsequent annuities, she does not appear to have had any distinct and separate solicitor. With respect to the fourth annuity, there is that parenthetical expression to which my attention was called, but upon which I do not place much reliance, because Mr. Davidson was the solicitor and agent acting for the assurance company. He expressly states that he explained each of these transactions to her, and that he told her they were exactly the same as the former. They happened in three consecutive years, and are in all respects like the first: and this transaction being fully explained to her, she must be taken to have understood the others; and the circumstance that Mr. Boast was her intimate medical adviser, that he had with another gentleman negotiated the terms of separation from her husband, and that she was, though I am not sure of the fact, residing with him, or at all events in the neighborhood of his residence, and that being a lady in infirm health she relied much upon the assistance and medical advice of this gentleman, is insufficient to counterbalance the direct testimony of her understanding this matter, in the absence of any thing like undue persuasion or undue coercion to induce her to execute this deed. If the matter stood there alone, I should be bound to give the plaintiffs in the first suit a decree, and to refuse the plaintiff a decree in the cross suit.

It is then stated that the title to the real estates was such that this lady was under an inability to contract; that she was, notwithstanding the deeds which were executed, tenant in tail, and that, during her husband's life, she could not enter into any contract whatever affecting her estate; and if she was tenant in tail, undoubtedly that would be so. It is stated that this must be taken upon the deeds of 1838 and 1841. Assuming that the deed of 1838 was in force, and that the deeds of 1841 were of no avail, the effect would be that under that deed she would have taken an estate for her separate use during coverture, and her contract would have bound that estate during the coverture, but not beyond it. But I do not go into those circumstances, there is a higher principle, which precludes the possibility of that question arising. This was the case of a ward of court who, committing a contempt, (which, though an infant, she might do,) marries, upon which the court directs what settlement shall be executed to secure the property of its ward. The court compels the husband to enter into a covenant in 1831, detailing the manner in which his wife, when she attains the age of twenty-one years, shall settle the whole of this property. When she attains twenty-one, the court directs the husband and the lady to execute a settlement, in conformity with the direction. It appears (assuming the whole of the argument to be correct) that by some informality that has not been done; but that the parties from that time down to the present have acted upon it as if it had, and with (as must be assumed) a full knowledge of the circumstances and consequences which were connected with it. This court will compel, if necessary, that to be done

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which it directed; and having ordered a ward of court and her husband to execute a settlement, it will not permit them to deal with the property in a manner other than that in which the court has directed; and that consequently the husband, if living, and the wife, are bound by the terms of that settlement; and without expressing any opinion upon what might be thought proper, the court would find it impossible, in any case where it deals with the property of a ward of court, and the husband who marries her, to carry into effect its orders, or to prevent them being laughed at, unless it held this doctrine. I am, of opinion, therefore, that this lady having treated herself as if she had the estate expressed in the settlement executed in 1841, and having dealt with these persons upon that footing, cannot now repudiate that transaction; and that, having, to some extent, an estate for her separate use during the coverture, and being, in respect of that, and of what the court directed to be done, a *feme sole* — having dealt with these parties *bonâ fide* on that footing and on that assurance, she cannot now repudiate that character and say that the acts which she did are not valid and binding upon her.

This also is not a case in which the court will rectify the settlement, or at all events, it will not exclude the rights of the assurance company with whom she has dealt. By her letter she referred the solicitors of the assurance company to her trustees to see the settlements, and she induced the plaintiffs to act on the foundation of their being correct and accurate. It would be a most singular doctrine if this court were to hold that persons who had dealt with other parties, whose rights were determined by a settlement directed by the Court of Chancery, could afterwards be told, "You must perceive that the court made a mistake; that it has done wrong, and thereby you had notice from the beginning that the court would set this right; and therefore you are to be deprived of that which you have purchased *bonâ fide* for valuable consideration." If the fact of not impugning the rectitude of the decisions of the Court of Chancery, or the acts it has directed to be done, were to be visited on persons who deal on the faith of those acts or those decisions being accurate, the most grievous evils would arise with respect to all the transactions of society; it would be directly opposed to every principle on which this court acts both in appeals and in numerous other cases; such, for instance, as where a person *bonâ fide* pays money to an executor who may afterwards prove to be a person not entitled to have probate of the will; and many cases of the same description. This settlement, therefore, could not be rectified, with any view to affect or exclude the interest of the assurance company.

It is not necessary to go further on the present occasion. I doubt very much whether the court would rectify the settlement, or whether it can be treated as a case in which there was a mistake or miscarriage. It is distinct from the cases referred to, where, from the dropping of a limitation, or the like, an error may be apparent on the face of the deed. It is possible to conceive that this court in many cases may think it an evil to introduce a restraint against anticipation on the life estate of the wife. It so happens that the proposals here

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contained no restraint against anticipation. It is stated that you must assume they were intended to include it; because the Master, in following those proposals, has introduced a restraint against anticipation, so far as relates to the personal estate. But why might it not be equally urged that it is an error, and that because he omitted it in the real estate he ought also to have omitted it in the personal estate, and that as the proposals were silent on that matter, they ought to govern what the settlement ought to be? It certainly would be desirable in most cases and the court usually does introduce a restraint against anticipation, where it gives an estate to the separate use of a married woman, particularly where the marriage has taken place not under the sanction of the court; but there may be various circumstances which may induce the court not to adopt that course.

Upon these three grounds taken together, I see no reason whatever for impeaching this transaction or for setting it aside. I cannot refrain from saying, upon the evidence of Mr. Boast, (of which a very discreet and judicious use has been made,) that it appears as if he was rather trying to repair the fraud which he had committed on this lady, by endeavoring to commit another upon the assurance company, with whom he himself had dealt.

On the fourth question, respecting the retainer of a part of the purchase-money, it appears at present, that upon the two first transactions the evidence is distinct and clear, that the whole of the purchase-money was paid to Mrs. Cock; and, therefore, I see no ground for impeaching those transactions; but on the two subsequent occasions, it appears to me at present that there is matter upon which I should hear a reply.

R. Palmer. The argument did not touch the question whether the articles were binding upon the lady. It assumed that this was not decided in the present case. In *Savill v. Savill*, 2 Coll. 721, it was held such a settlement was not binding. There a ward who married in infancy with the consent of the court, agreed to settle her real and her personal estate, and she having died before a fine could be levied, her heir at law claimed the real estate against the settlement, and was held entitled to do so, and the husband was recouped out of the reversionary interest in the personal estate, the value of the wife's interest in the real estate.

Stuart, in reply. No portion of the consideration was retained by the plaintiffs. The company were to have the security both of Mrs. Cock and Mr. Boast; they stipulated for an assurance upon both their lives, and it is the usual course for the purchasers to pay the costs of the securities. *Mootham v. How*, 7 Taunt. 596; *Aston v. Gwinnett*, 3 You. & J. 136; *Hurd v. Girdlestone*, 6 Taunt. 8; *Hall v. Hawkins*, 1 Jur. 235; *Girdlestone v. Allan*, 1 B. & C. 61; s. c. 2 Dowl. & Ry. 150; *Barber v. Gamson*, 4 B. & Ald. 281.

R. Palmer, in reply, in *Cock v. Clark*. In the cases cited there was previous stipulation upon a *bona fide* contract, in which there was no

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surprise upon the party; but in this case there are charges wrong in principle, which show a pressure on the part of the grantees. There is, however, a judicial discretion in the 53 Geo. 3, c. 141, s. 6; but in the cases cited the sums were not due.

Southgate, for C. F. C. Cock, the eldest son of Mrs. Cock, the tenant in tail under the deeds of the 27th and 28th of June, 1838.

THE MASTER OF THE ROLLS. I know of no reason why the separate estate of this lady should bear the premiums upon the policy assuring the life of Mr. Boast, and there are also other objectionable items; but having a discretion, as stated in *Barber v. Gamson*, and agreeing with the observations in *Cook v. Tower*, 1 Taunt. 372, that it is to be exercised to set aside an annuity in those cases only where there has been some act amounting to actual fraud or an improper retainer, and having regard to the spirit of the act of parliament, I think there is not sufficient to induce me to say that this was such a retainer of the consideration. I must, therefore, direct an account, and make it a condition that credit shall be given in it for these items, with interest upon them from the time when they were paid. It must also exclude the compound interest taken upon the arrears of the annuity, as that was not justifiable. My decree in the cause of *Blaikie v. Clark* will therefore be to direct an account of what is due to the plaintiffs upon the four annuities, with compound interest and interest upon the premiums of the policy of assurance, together with the costs properly incurred and properly retained; it having been determined in *Maber v. Hobbs*, 2 You. & C. 317, that costs properly incurred may be retained at the time; and if they were not paid by Mrs. Cock, then the real estate must be made liable; but in taking such account the credit I have mentioned must be given to her.

The bill in *Cock v. Clark* must be dismissed; but as I consider there was some foundation for the relief asked, it must be without costs; but Messrs. Clark & Smart, her trustees, must have their costs, charges, and expenses.

Extract from the Decree. "His Honor doth declare that the sum of 74*l.* 5*s.* charged against Clarissa Cock for the premium and stamp on a policy on the life of David Boast, and the four sums of 4*l.* 7*s.* 1*d.* 3*l.* 2*s.* 2*d.*, 1*l.* 17*s.* 10*d.*, and 13*s.* 5*d.* respectively charged against C. Cock for interest on annuities due on the 21st of July, 1846, the 21st of October, 1846, the 21st of January, 1847, and the 21st of April, 1847, respectively up to the 10th of June, 1847, respectively, were improperly so charged against C. Cock."

"And that for the sum of 74*l.* 5*s.*, and interest thereon from the 26th of April, 1846, after the rate of 5*l.* per cent. per annum, and for, &c., the several other sums amounting to 10*l.* 0*s.* 6*d.*, and interest thereon at the same rate from the 10th of June, 1847, credit ought to be given to her, and in taking the account of what is due to the Aberdeen Assurance Company upon the several annuities, it is ordered that the Master do give credit to C. Cock for the said sums of 74*l.* 5*s.*

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and 10*l.* 0*s.* 6*d.*, with interest thereon respectively at the rate of 5*l.* per cent. per annum from the 25th of April, 1846, and the 10th of June, 1847, respectively as payments by her made in part discharge of the same annuities.¹

BLAKENEY v. DUFAUR.²

November 11, 1852.

Costs, Security for — Plaintiff going out of the Jurisdiction.

Where a plaintiff goes out of the jurisdiction, pending a suit, for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs, the court will direct him to give security for costs.

In this case, the plaintiff having gone out of the jurisdiction, the defendant moved, before the Master of the Rolls, that the plaintiff should give security for costs; and that, in the mean time, all proceedings in the suit (which had come to a hearing, and in which a decree for an account had been pronounced but not drawn up,) should be stayed. The motion was opposed, but the Master of the Rolls made the order. From this order the plaintiff now appealed.

In support of the motion in the court below and of the order at the rolls, affidavits were filed, from which the following facts appeared:— that in March, 1850, when the suit was instituted, the plaintiff lived at No. 19 Queen's Road, Regent's Park, London, but that soon after he went to lodge in Jermyn Street, St. James's, and that subsequently he went to live at Chiswick; that during this period a petition, under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849, had been presented to the Court of Bankruptcy, but which produced no result; and that also, during this period, the defendant and others employed by him tried, but without success, to find the plaintiff; that the defendant was informed of the plaintiff having left England; and that some months afterwards the plaintiff returned to England and resided at Feltham Cottages, but afterwards removed to his former lodging in Jermyn Street, and thence to Vauxhall; that at the end of May, 1852, he left England for Jersey, where he arrived on the 3d of June, and had resided there ever since; and that the defendant, on the 16th of July, gave notice of motion for the 29th that security should be given. The only affidavit on behalf of the plaintiff, in opposition to the motion, was made by his solicitor, simply stating that the plaintiff had gone to Jersey on a visit to his sister

¹ See *Barber v. Thomas*, 7 Com. B. Rep. 612.

² 22 Law J. Rep. (N. S.) Chanc. 889; 17 Jur. 98.

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and the deponent believed it not to be his intention to reside there permanently, for that the deponent had seen a letter written by the plaintiff, in which he expressed his intention of shortly returning to London.

Elderton, for the appellant, said that the evidence in support of the motion for security failed to show an intention on the part of the plaintiff permanently to reside abroad, and that the mere fact of the plaintiff going abroad was not sufficient to induce the court to require him to give security. *Hoby v. Hitchcock*, 5 Ves. 699. In addition to this, there was the evidence of the plaintiff's solicitor, who proved the probability of the plaintiff coming back soon, as stated in the letter which the deponent had seen.

Smythe, in support of the order of the Master of the Rolls. The mere fact of a man going abroad who happens to be a plaintiff in a suit is admitted to be insufficient to justify a defendant in calling upon the court to make an order directing that security be given for costs. To make such an order would be manifestly absurd, for in that case no man whose business required his going from time to time and only for short periods could venture to attend to his duties, lest, being a plaintiff, he should be called upon to give security for costs. Neither solicitors nor barristers who happened to be litigants in chancery could venture to leave the country for the long vacation if such a rule existed.

[KNIGHT BRUCE, L. J. The plaintiff arrived in Jersey early in June, and has been there ever since. It is now November, and although the notice of motion was given for July last, it is not irregular nor unjust to look at subsequent events for the purpose of assisting ourselves in arriving at a just conclusion as to the intention of an act that took place before.]

A very different conclusion may, however, be drawn from the circumstances of this case than that the plaintiff only intends a temporary absence; he is embarrassed in his circumstances, he keeps out of the way, evades inquiries and cannot be found, and finally he goes abroad; and remaining there between four and five months, the inference is irresistible that he intends permanently to reside there, and therefore ought to give security, as his case comes within the rule requiring such security. *Weeks v. Cole*, 14 Ves. 518.

Elderton was heard in reply.

LORD CRANWORTH, L. J. It is a proposition, upon which there cannot be a doubt, that a person will not be allowed to institute a suit who is permanently resident abroad without giving security for costs; and the same rule holds where a plaintiff goes abroad with the intention of permanently residing there. Whenever security is asked for, the question arises, whether the party is resident abroad or not; and the answer to that question depends, in each case, upon the interpretation to be put upon the phrase, "resident or permanently

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resident abroad." If it is imagined to mean that in no case is a person to give security for costs unless it is shown that he intends to end his days abroad, I entirely dissent from such an interpretation. That is not the meaning of the phrase. A party goes to reside abroad within the meaning of the rule, who goes for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs in the suit. A question of this sort cannot be easily dealt with by laying down a general rule; it being impossible to define the extent of circumstances necessary in every case to bring it within the rule. In the report of the case, before Lord Loughborough, of *Hoby v. Hitchcock*, all that appears is, that the party had gone on a voyage to the West Indies, and there was no evidence, one way or the other, as to his intention to return. Lord Loughborough, inferring, I presume, that the party had gone merely with the temporary object of seeing to his affairs, and that he intended shortly to return, refused to order security. So courts of common law constantly refuse to require security to be given where the absence abroad of the party appears to be for a purpose only temporary. It is obvious that, considering the modern facilities for travelling, such orders, if made in those cases, would be a gross oppression. The party must go abroad under circumstances rendering it highly improbable that he can return within the time when he is likely to be called upon for costs in the suit. If, for instance, it were shown that he had gone abroad for some object which would keep him there for ten years, he would probably be held to be obnoxious to the rule.

The question in the case now before us is, whether the plaintiff has gone to Jersey under circumstances bringing him within the rule. I think he must be held to have done so. Being evidently in embarrassment, he went from one house to another, and was not forthcoming when sought for. He went to Jersey in May, and arrived there on the 3d of June. An application was then proposed to be made by the defendant for security for costs. On the 16th of July notice of motion for this purpose was given for the 29th of July. In support of that motion a statement is made, in the defendant's affidavit, to the effect that he believed the plaintiff was resident in Jersey. To this no answer was given by the plaintiff during the thirteen days' interval between the notice and the motion, and during which there was ample time to communicate that statement to the plaintiff at Jersey and to obtain from him an affidavit contradicting it if he could. That step, however, was not taken; but the solicitor, in London, of the plaintiff, merely stated, in his affidavit filed in opposition to the motion, that he believed it not to be the intention of the plaintiff permanently to reside in Jersey, because he had seen a letter written by him (which, however, is not produced,) in which he says he intends to return to England. That is not a satisfactory way of surmounting a difficulty, which it would have been so easy to clear up by means of a direct communication with the plaintiff at Jersey. I am far from thinking that the evidence of the plaintiff was answerable on the 29th of July; but (as my learned brother has suggested) if

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the evidence is to be discussed some months afterwards, we may, in dealing with it, regard the circumstances of the case as they now exist. Now, it is quite clear that the question whether the plaintiff was resident in Jersey on the 29th of July must be answered now in the affirmative.

KNIGHT BRUCE, L. J. It is not suggested that this gentleman is in any public service, civil or military. He left London to go to Jersey in May; he arrived there early in June; we are now in November, and there is no evidence that in the interval he has ever been at any other place. I am of opinion that, within the meaning of the rule, there has been a permanent change of residence to a place out of the jurisdiction. The appeal must be dismissed, with costs.

*Ex parte CAUTLEY.*¹

January 14 and 29, 1853.

Will — Bequest — Money on Securities — “Mortgage” — Legal Estate.

A testator being mortgagee in fee of an estate, bequeathed to trustees, “all his money in the funds and on securities,” upon certain trusts declared by his will: —

Held, that the legal estate in the mortgaged property did not pass under these words.

THIS was an application under the Trustee Act, that some person might be appointed to convey in the place of an infant heir at law.

The application was originally made before the judge in chambers; but a question having arisen in whom the legal estate was vested, the case was directed to be argued in court.

It appeared that Roger Baskett, by his will, dated in the year 1841, after giving various legacies, gave and bequeathed to his trustees, G. Mattison and J. Foster, their executors, administrators, and assigns, all his household furniture, plate, china, and books, and also all his money in the funds and on securities, and all other his moneys, goods, chattels, and personal estate whatsoever and wheresoever, upon certain trusts therein mentioned, for the benefit of his wife and children. In the year 1833, certain estates which had been previously conveyed in fee to Kingsman Baskett, by way of mortgage, for securing the repayment of 1,000*l.* and interest, were devised to the testator, Roger Baskett, and the mortgagee being now desirous of paying off the mortgage and taking a reconveyance of the estate, a question was raised whether the legal estate in the said mortgaged premises passed

¹ 22 Law J. Rep. (N. S.) Chanc. 391; 17 Jur. 124.

Ex parte Cantley.

by the will of Roger Baskett, under the words, "all my money in the funds and on securities," or whether it was undisposed of by the will, and passed to his infant heir at law.

Haynes appeared in support of the application, and contended, that the legal estate in the mortgaged property passed under the words of the will, and cited *Renvoize v. Cooper*, 6 Mad. 372; *Ex parte Barber*, 5 Sim. 451; *Mather v. Thomas*, 6 Sim. 115; 10 Bing. 44; *Doe d. Guest v. Bennett*, 6 Exch. Rep. 892; s. c. 5 Eng. Rep. 536; *In re Field's Mortgage*, 9 Hare, 414; s. c. 7 Eng. Rep. 260; *In re King's Estate*, 21 Law J. Rep. (N. S.) Chanc. 673; s. c. 13 Eng. Rep. 128.

Judgment reserved.

JANUARY 29. KINDERSLEY, V. C. The question in this case is, whether the legal estate in the mortgaged premises passed under the will of Roger Baskett. The passage upon which the question turns is this: "I give and bequeathe to G. Mattison and J. Foster, their executors, administrators, and assigns, all my household furniture, plate, china, and books, and also all my money in the funds and on securities, and all other my moneys, goods, chattels, and personal estate whatsoever and wheresoever." What I have to decide is, whether these words, "All my money in the funds and on securities" are sufficient to carry not only the money due upon the mortgage, but the legal estate in the mortgaged premises which constitute the security. All the authorities appear to me to stand upon this distinction — that if a testator having money secured on mortgage of real estate, bequeathes the money so secured, that will not pass the legal estate; but if he bequeathes the securities upon which the money is invested, that is sufficient to pass the legal estate in the mortgaged premises.

There is, however, one case, that of *Doe v. Bennett*, which appears at first sight to militate against this rule of construction. In that case, Parke, B., in his judgment, makes this observation:—"The question is, whether the legal estate passed by the will of the testator. The language of the will is, 'I also leave my wife, Rebecca Hayes, to receive all moneys upon mortgages and on notes out at interest.'" These words, in my opinion, pass the security, that is, the legal estate in which the money was secured; and I should be of the same opinion if there had been no case of a devise of "mortgages." It must be assumed that the testator intended his wife to receive the money and to possess all the powers necessary for the purpose of recovering it; and, therefore, she is entitled to bring ejectment for that purpose."

Now, if the case before me had been the same as that of *Doe v. Bennett*, I should certainly have felt great difficulty in deciding contrary to those learned judges; but if they intended to carry the doctrine to this extent, that a legatee who is to receive the money is also to take the legal estate in the mortgaged premises, then I cannot concur in the proposition. If that principle were to be carried out, it

In re Holmes's Trust.

would apply to a case where the testator gives his general personal estate to his executors—the executors would then have the legal estate, although the testator only intended them to receive the money due upon the mortgage security: that could never be the intention. The case of *Doe d. Gust v. Bennett* is not, however, in all respects similar to this. The case which was before Parker, J., *In re King's Estate*, puts the matter upon its right footing. It was held, that “securities for money” would pass the legal estate; but that “money on securities” would not do so.

In the case before me, there is no gift of the securities, but only a gift of the money on the securities; and, under these circumstances, I think that the legal estate did not pass by the will of Roger Baskett; and, therefore, that the order must be drawn up so that there may be some person appointed to convey on behalf of the infant heir.

*In re HOLMES'S TRUST.*¹

January 17, 1853.

Legacy—Residuary Bequest—Legatees specially named.

A testator, after giving legacies to various persons, some of whom were mentioned by name and others described as a class, bequeathed the residue of his property to his several legatees thereinbefore “specially named,” exclusive of the objects taking under the trusts for the distribution of blankets:—

Held, that the testator, by excluding certain persons not mentioned by name from his residuary bequest, had sufficiently explained his intention; and that under the words “specially named,” those legatees who were not mentioned *nominatim*, but only described as a class, were entitled to share equally with the other legatees.

THIS was a petition, presented by the legatees under the will of William Holmes, for the purpose of obtaining the decision of the court upon the construction of the testator's will, dated the 19th of December, 1846. The testator devised and bequeathed to certain trustees therein named all his freehold and leasehold estates, and all the residue of his property, estate and effects whatsoever and where-soever, both real and personal, upon trust to sell and apply the proceeds in the following manner, that is to say:—upon trust, in the first place, to purchase so much capital stock of the 3l. per cent. consolidated bank annuities as would produce a yearly dividend or sum of 5l. 12s. sterling, in the joint names of the then vicar and the then churchwardens and overseers of the poor for the time being of the parish of Lewisham, to be held by them upon trust, and to the intent and purpose, that the vicar, churchwardens, and overseers of the poor for the time being of the said parish, and their successors forever,

¹ 22 Law J. Rep. (N. S.) Chanc. 393.

In re Holmes's Trust.

should lay out the said yearly dividends or sums of 5*l.* 12*s.* yearly, and every year for ever, in the purchase of seven pairs of blankets, and distribute the same amongst seven poor and industrious families, parishioners of Lewisham, who should not be receiving parochial relief, the said seven families to be chosen at a public meeting of the parish to be convened for that purpose. The trustees were then directed, out of the moneys to arise from the sale of the testator's property, to pay the legacies therein mentioned; then followed the names of a number of persons to whom various sums were to be paid, amongst others, a sum of 300*l.* to the several brothers and sisters of his late cousin J. Scatchard, deceased, to be equally divided between them, share and share alike. Various other sums were given to persons specially mentioned by name; then followed a legacy of 20*l.* to his servant J. Wakeling. To each of his other servants who should be in his service at the time of his decease the sum of 10*l.* To his two executors the sum of 50*l.* each; to each of the three children of his late niece Catharine Biggs, deceased, when and as they should respectively attain twenty-five, one equal third part of a sum of 500*l.*, and to the survivors in case either of them should die under that age; but in case they should all three die under the age of twenty-five, then the testator directed that the said sum should be divided amongst his legatees in like manner as he should direct with respect to the ultimate residue of his trust moneys. And as to the ultimate residue of his trust moneys, and as to the surplus or residue of the said trust moneys which should remain after payment of the several legacies thereinbefore bequeathed, and the purchase of the several sums of stock aforesaid, or which should accrue by reason of the failure of any of the trusts concerning the same stocks, the testator directed that such surplus or residue of the trust moneys should be held in trust for, and the testator gave and bequeathed the same unto, his several legatees thereinbefore specially named, exclusive of the objects taking under the trusts for the purchase and distribution of blankets as aforesaid, equally, share and share alike, to and for their several and respective own absolute use and benefit: and the testator appointed W. Finch, J. Bradley, and T. Parker, executors and trustees of his will.

The petition stated that the ultimate residue of the testator's property, after payment of the legacies therein mentioned, amounted to the sum of 1,212*l.* 5*s.* 5*d.*, which had been paid into court by the trustees and executors appointed by the will. Upon a reference to the Master to ascertain who were the legatees specially named in the will of the testator, the Master had made a list, including twenty-five persons, whose names were all set forth in a schedule to his report, and the petition prayed that the sum of 1,212*l.* 5*s.* 5*d.* might be paid to the several legatees whose names were set forth in the schedule, share and share alike.

In the schedule to the Master's report the six brothers and sisters of the testator's late cousin, J. Scatchard, and the three servants of the testator in his service at the time of his decease, but not mentioned by name, and the three children of the testator's niece, Catha-

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rine Biggs, not having been named in the will, were excluded; and the question now raised was, whether these legatees were to receive a share in the residue of the testator's property.

Smith, in support of the petition, contended that only those legatees who were mentioned *nominatim* were entitled to share in the residue of the testator's property, and that the Master was right in excluding from the schedule to his report all those who were not specially named. There were two distinct classes of legatees described, those who were named and those who were not named; and to allow both classes to participate would be to exclude all effect to the words "specially named;" but under any circumstances, the testator could not be supposed to have intended to include his servants. A distinction might fairly be drawn between them and the brothers and sisters of J. Scatchard, and the children of his niece, Catharine Biggs, as the character of the latter, as legatees, did not depend upon accident. It was also contended that all the legatees took equal shares in the residue. The following case was cited — *Bunnett v. Foster*, 7 Beav. 540.

Walker, contra, submitted that the words "specially named" did not of themselves exclude those legatees who were mentioned as a class only; that the testator had himself put a construction upon the will, by excluding in express words the poor who were to have blankets. There would have been no reason for doing this if he only intended those legatees who were mentioned by name to share in the residue. The case of *Bromley v. Wright*, 7 Hare, 334, was cited.

Steele appeared for the executors.

Smith, in reply.

KINDERSLEY, V. C. What I have to do is to put an interpretation upon the residuary clause in the testator's will, by which he gave and bequeathed the surplus and residue of the trust moneys to his trustees, to be held in trust for his several legatees thereinbefore specially named, exclusive of the objects taking under the trusts for the purchase and distribution of blankets, equally, share and share alike, to and for their several and respective own absolute use and benefit. There is no doubt the strict and proper meaning of the words "specially named" would be the persons mentioned by name. If the words had been "specially mentioned," I do not think that any contention would have been raised as to the exclusion of any of the legatees; "specially mentioned" would then have meant those mentioned as special donees of the legacies. The word "named" is often, though not very correctly, used as a substitute for the word "mentioned." In the case of *Bromley v. Wright*, some of the legatees were not named in the sense of being mentioned by name; and yet the testator, in giving to "the several legatees hereinbefore named," evidently meant those before mentioned, although they were not expressly named. It is extremely common to use the term "named"

as a substitute for "mentioned" —one has frequently seen such language.

Now, the question here is, whether the testator uses the expression "specially named" in the sense of the legatees mentioned *nominatim*, to the exclusion of those not expressly named, or whether he meant all those who are mentioned. In looking through the various legacies, particularly those where the name is not used, I find they are cases in which the legacies are to a class of persons. It may be that the individuals composing the class were not known by name to the testator, or it may be that it was more convenient to him to use the expressions he did, as, for instance, in the gift to the servants, where the words are "to each of his other servants, who should be in his service at the time of his decease." Who those servants might be, it is evident he could not know. Now, on the question as to the sense in which the testator has used the term "specially named," I think he has himself given me a key to the interpretation of his meaning; for if he meant the gift to be only for those mentioned *nominatim*, why should he have excluded from the residuary benefit one particular class of persons who are not specially named? I allude to the following passage: "exclusive of the objects taking under the trusts for the purchase and distribution of blankets." This passage would have been useless if he had intended to exclude all the legatees who were not mentioned *nominatim*; but he must have considered that unless he had specifically excluded them from the gift of the residue, they would have taken a share in such residue. It appears to me that the testator, in this particular exclusion, has given a clue by which I am bound. It is not only a clue, but a clear indication of the meaning of the words he has used. Perhaps a little corroboration might be derived from the fact, that as to some of the particular legatees, he has directed that in case they die under twenty-five, their legacies are to be divided amongst his legatees in like manner as he should direct with respect to the ultimate residue of his trust moneys. Upon the whole, I think, I should be disregarding what the testator has said if I were to interpret the residuary clause to mean a gift only to the several legatees thereinbefore specially named. Notwithstanding the word "specially" I cannot give it this interpretation; "specially" does not mean to describe the persons *nominatim* to the exclusion of those mentioned as a class, but it must mean those legatees to whom he has given a special legacy.

It has been suggested by the executors that it might be contended by the vicar, churchwardens, and overseers of the poor for the time being of the parish of Lewisham, that they were not expressly excluded from the residuary bequest. If I thought any thing could be made of that suggestion, I should like to have those parties before me to argue the point; but I think I should be imposing great expense upon them in putting them to argue a case which is, in my opinion, untenable. The money is given to the vicar, churchwardens, and overseers, in trust to apply the income for the benefit of certain persons who are expressly excluded from the residuary bequest by the words the testator has used, and it cannot be said that, when

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the persons who are to take the benefit are excluded, then the trustees could take any thing for their own benefit. As to the servants, I see no distinction between the gifts to them and the gifts to the brothers and sisters or the children of a legatee.

For the reasons I have mentioned, I think all the legatees mentioned in the will, including the servants living with the testator at the time of his decease, are entitled to share in the residue, and that the money must be divided between them all equally.

In re KINCAID'S TRUST.¹

January 17, 1853.

Baron and Feme — Settlement, Wife's Equity to — Amount of Fund under 200l.

A married woman, whose husband was a bankrupt, became entitled to a fund under 200l. There was an affidavit of no settlement upon the marriage, and that the wife had no other fund out of which to maintain herself or her children:—

Held, that the smallness of the amount did not prevent the wife's right to a settlement, and that the special circumstances were sufficient to induce the court to settle the whole fund upon her and her children; the husband's assignees being excluded from any share.

Two petitions were presented in this case for the payment out of court of a sum of money paid in under the Trustees Relief Act. It appeared that, by an indenture of settlement, a policy of insurance was assigned to two trustees upon trust to pay certain debts, and subject thereto to hold the residue in trust for Caroline and Mary Ann Kincaid in equal shares. The funds in the hands of the trustees, which amounted to 307l., had been paid into court by them under the Trustees Relief Act.

One of these petitions was presented on behalf of Caroline Kincaid for the payment out of court of her moiety of the fund, and the other petition was on behalf of Mary Ann Kincaid for payment to her of the other moiety. No question was raised as to Caroline Kincaid's moiety, but as to the other moiety it appeared that Mary Ann Kincaid had been married and her husband had become bankrupt. There was an affidavit that no settlement had been made upon her marriage, and that she had no other property to support herself or her children.

Eddis appeared in support of the petition of Caroline Kincaid.

Walford, for Mary Ann Kincaid, (now Mrs. Mowatt,) contended that her moiety ought to be settled upon her. The assignees under the

¹ 22 Law J. Rep. (N. S.) Chanc. 395; 17 Jur. 106.

bankruptcy would appear and would ask that this share of the fund should be paid to them; but it was submitted that the petitioner was entitled to a settlement, if not of the whole, at any rate of a portion. It would be urged that there was a usual form of order for payment of money to the husband of a married woman when it did not amount to 200*l.*, without her consent, upon an affidavit of no settlement. There was no doubt that this form of order did exist. Beames's Orders, 464. But that was quite distinct from the wife's right to a settlement in any sum, though it might not exceed 200*l.* The amount of the sum had nothing to do with the wife's right to a settlement. The only object of the order was to save expense where the sum was small. A false impression had existed upon this subject in the profession, but it had been set upon a right footing by the Master of the Rolls in a case of *In re Cutler*, 14 Beav. 220; s. c. 6 Eng. Rep. 97. If then the wife were entitled to a settlement, the only question was as to the amount, and it was submitted that the special circumstances in this case, namely, the insolvency of the husband and the fact that the wife had no other fund for her support, were sufficient to induce the court to direct the whole sum to be settled upon her, in opposition to any claim of the assignees.

The following authorities were also cited: — *Bourdillon v. Adair*, 3 Bro. C. C. 237; *Elworthy v. Wickstead*, 1 Jac. & W. 69; *Foden v. Finney*, 4 Russ. 428; *Dunkley v. Dunkley*, 16 Jur. 767; s. c. 13 Eng. Rep. 318; *Napier v. Napier*, 1 Dru. & War. 407; *Brett v. Greenwell*, 3 You. & C. 230; *Gilchrist v. Calor*, 1 De G. & Sm. 188; *Vaughan v. Buck*, 1 Sim. (n. s.) 284; s. c. 3 Eng. Rep. 135; *Scott v. Spaskett*, 3 Mac. & G. 599; s. c. 9 Eng. Rep. 265; *Gardner v. Marshall*, 14 Sim. 587.

Palmer, for the assignees of the husband, contended that it had always been considered by the profession that where a fund under 200*l.* was given to a single woman, her consent upon her marriage was not required, but that so small a sum should be paid at once to the husband upon an affidavit of no settlement. It was impossible to contend against the decision of the Master of the Rolls in the case of *In re Cutler*; all that could be said was that the decision was contrary to all the cases which had preceded it, and that it was now competent for the court to reconsider the question; and it was submitted, that the whole of the fund ought to be paid to the assignees of the husband.

KINDERSLEY, V. C. Being of opinion that the wife is entitled in this case to a settlement of the whole fund, I need not trouble Mr. Walford to reply. The first question to be decided is, whether the wife is entitled to any settlement at all when the sum is under 200*l.*, and the next question is, the amount, if any, to which she is entitled. The rule of equity which entitles a married woman to have a settlement out of a fund which, at law, the husband would be entitled to, *jure mariti*, depends on a very different principle from any which can be drawn from a rule of practice simply, which provides for the pay-

ment of any sum under 200*l.* to the husband without taking the consent of the wife. It is quite true that, in practice, it is not usual to take the consent of a married woman in court when the sum to which she is entitled does not exceed 200*l.*, and that there is a form of that description in Beames's Orders, but the principle is not affected by this practice. The rule entitling the wife to an equity of a settlement, is one which is independent of the question of amount. I do not see why the wife is not as much entitled to a share out of a small amount as out of a large amount. The sum, though small, may be of as great importance to some persons as a larger amount may be to others. With regard to the rule which requires generally that the wife should give her consent in court, having been examined separately, in order to waive her right to a settlement, that rule is only for the purpose of enabling the court to be perfectly satisfied that she personally knows her rights, and thinks fit to waive them. The court has thought that where the fund is under 200*l.* the consent of the wife need not be required, but that does not exclude her from insisting on having a settlement. A wife might file a bill to have a settlement out of the fund, and I never heard that the rule would be different where the amount was small from what it would be with a large fund. I quite concur with what the Master of the Rolls decided, that where a wife insists on her equity for a settlement, the fund being under 200*l.* is no reason why the right should not remain the same. No doubt, for some time there was an impression that the two rules stood upon the same principle as to practice, but the Master of the Rolls has disabused the profession upon this point. It is merely a rule of convenience, not opposed to, but, on the contrary, concurrent with, the principles I have above referred to, as guiding courts of equity in these cases; and if circumstances should arise, as in the present case, to show the expediency of departing from it, the court will at once step in to protect the interests of the wife and children.

The Master of the Rolls, in *Cutler's case*, the circumstances of which were similar to the present, decided quite in accordance with these views. There the sum was under 200*l.*, but as the wife insisted on and claimed a settlement in her favor, the court considered her entitled to it on the general principles of equity, and disregarded the fact of the smallness of the sum altogether. The case of *Foden v. Finney* was there cited, and its unsatisfactory nature commented on, and the principle to be deduced from the decision was dissented from, by the Master of the Rolls, who very properly observed, "It appears to me to be quite inconsistent to hold, that if the fund be 202*l.*, the wife is entitled to have the whole settled, and yet, that if it were but 199*l.*, the husband's assignees would take it all." In these views I fully concur, and have to express my satisfaction that the Master of the Rolls has made this decision. I have, therefore, no hesitation, in accordance with that case, in coming to the conclusion that the smallness of the fund does not preclude the wife from enforcing a settlement, in opposition to the assignees of the husband.

The next question is as to the amount to be settled. The common course, although there is no rule to that effect, has been to say that

where the husband becomes bankrupt, half shall go to the husband's assignees, and the other half shall be settled upon the wife and her children; but if there are any special circumstances brought forward as a reason for a different course, there is no particular rule to bind the court on the subject. In some cases it may be expedient to settle the whole, or some different aliquot part, such as two thirds of the fund, as I did myself in a late case. Indeed, all the authorities on the subject of late years tend to prove, that in every case the court is guided by the particular circumstances of each case, and that there is no established rule as to what proportion shall be given to the wife, and what to the husband or his assignees. In *Napier v. Napier*, Lord St. Leonards, when Lord Chancellor of Ireland, gave 600*l.* to the wife and children, and 400*l.* to the assignee of the husband, where the fund amounted to 1,000*l.* In *Gardner v. Marshall*, the sum although a large one, amounting to 5,000*l.*, was given to the wife for life; but in that case the husband had previously received large sums of money in right of his wife. In *Gilchrist v. Cator* and *Scott v. Spashett* the whole fund was given to the wife; and in *Vaughan v. Buck*, Lord Cranworth settled two thirds on the wife. In the late case of *Dunkley v. Dunkley*, Lord St. Leonards thought himself warranted in giving the whole fund to the wife and children. The current of authorities runs, therefore, to this effect:—that there is no established rule to take away the discretion of the judge, and that every particular case must be decided upon its own particular circumstances. Now, what are the special circumstances in this case? Here we have the husband insolvent and quite unable to support his wife and children. If I were to give one half of this small fund to the husband's assignees and the other half to the wife and children, I do not think I should be deciding as the circumstances of the case require. It would be a mere delusion and mockery to call it a settlement. Taking into consideration, therefore, the fact that the husband has no means of supporting his wife, I feel myself justified in ordering that the whole fund shall be settled on Mrs. Mowatt and her children.

It was then ordered that the executor's costs should be paid out of the whole fund; that half of the residue should be paid to the petitioner, Caroline Kincaid, her share to bear her own costs. The costs of the assignees to be paid out of Mrs. Mowatt's share; and as to the residue of her moiety, the dividends to be paid to Mrs. Mowatt, for her benefit for life, and then to such of her children as should attain the age of twenty-one years; the order being made in this form to avoid the expense of a settlement.

• Roberts v. Berry.

ROBERTS v. BERRY.¹

January 25, 1853.

Vendor and Purchaser — Specific Performance — Time the Essence of the Contract.

An estate was put up to sale by auction on the 22d of July. By the conditions of sale an abstract of title was to be furnished within seven days from the day of sale on the application of the purchaser for the same; all objections were to be taken within eight days of such delivery, or to be considered as waived; the purchase to be completed on the 8th of August. The purchaser's solicitor called for the abstract on the 24th of July, two days after the sale. The estate was in mortgage, and the mortgagee being abroad, the abstract could not be made in time, but the same was delivered on the 3d of August. The purchaser, thereupon, claimed to rescind the contract, and brought an action for the deposit. The vendor filed a bill for specific performance, to which the purchaser put in a demurrer:—

Held, affirming a decree at the Rolls, overruling the demurrer, that time in the delivery of the abstract was not of the essence of the contract.

THE bill in this case was filed by vendors, praying for specific performance of a contract for sale. A demurrer was put in, which was overruled by the Master of the Rolls. This was an appeal from that decision.

The facts, as stated in the bill, were, that the plaintiffs put up certain ground rents and a cottage to sale by auction on the 22d of July, 1852, in three lots, and that the defendant, Mr. John Robert Berry, bought lot 1, for 800*l.*, and paid thereon a deposit of 160*l.*, and signed an agreement, bearing that date, for the purchase of lot 1, and payment of the remainder of the purchase-money according to the third condition of sale. The bill, among other things, further stated the third and fourth conditions of sale, the material parts of which were as follows:—

"3. The purchaser shall, immediately after the sale, pay into the hands of the auctioneers a deposit of 20*l.* per cent. in part of his or her purchase-money, and sign an agreement for the payment of the remainder to the vendor on or before the 8th of August next, at which time the purchase is to be completed; but if such purchase is not completed on the said 8th of August, the purchaser thereof, from whatever cause the delay shall arise or be occasioned, shall pay interest on the remainder of his purchase-money at the rate of 5*l.* per cent. per annum from that day until the day of completing his or her purchase, without prejudice to the right reserved to the vendor by the last condition; the purchaser will be entitled to receive the rents as from the day of completing the purchase or possession, as the case may be."

"4. In order to save expense, within seven days from the day of

¹ 22 Law J. Rep. (N. S.) Chanc. 398.

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sale, the vendor shall, at his own expense, on application for the same, make and deliver to the purchaser or his solicitor, an abstract of title, commencing with a conveyance to the vendors, and on the completion of the purchase, title-deeds of earlier date will be handed over to the purchasers; and no earlier title shall be required; and the purchaser shall make his or her objections or requisitions (if any) in regard to the title, and cause the same to be delivered at the office of the vendor's solicitor, within eight days from the receipt of his or her abstract; and all objections or requisitions which shall not be made within the time above specified, shall be taken to be waived, and shall not, under any circumstances, be capable of being afterwards made."

The other lots were not sold, but the defendant entered into negotiations for the purchase of lot 2, but the negotiations were not concluded. During this time, Mr. Farnell, the solicitor of the defendant, on the 24th of July, 1852, called for the abstract of title to lot 1, and for a copy of the contract. The title-deeds of lot 1, were in the hands of a mortgagee, and the plaintiffs applied to the solicitors of the mortgagee, who were not able to furnish the abstract at once, the mortgagee being abroad. On the 3d of August, the solicitors for the mortgagee and the plaintiffs furnished the abstract and a copy of the contract, and the solicitors of the mortgagee with them also sent a letter, dated the 2d of August, to the solicitor for the defendant, stating that the abstract could be examined with the deed at any time the defendant's solicitor should appoint. Mr. Farnell wrote a letter in reply, dated the 3d of August, "written, as the plaintiffs believed, after he had received the said abstract," in which he stated as follows:—"Not having received the abstract of title to the lot purchased by Mr. Berry, agreeably to the conditions, I presume there is some difficulty regarding the title. I will, therefore, thank you to return me the deposit of 160*l.* paid by my client, and I do hereby rescind the contract on his behalf." The same person also wrote another letter to the same solicitors, dated "August, 1852," but no day stated, acknowledging the receipt of the abstract, and referring to the letter of the 3d of August, as to the rescinding of the contract. The plaintiffs, in further letters, refused to submit to the contract being rescinded, but the abstract was returned to them on the 20th of August, and a notice given of an intention to proceed at law for the recovery of the deposit-money, and, subsequently, a writ of summons was issued. The bill, therefore, prayed specific performance of the contract and an injunction to restrain further proceedings in the action. The purchaser, Mr. Berry, the defendant, put in a demurrer which, as before stated, was overruled, and he now appealed.

J. H. Palmer, for the appeal. The conditions of sale are sufficiently clearly expressed to show that the intention of the parties was, that the abstract should be delivered within a stated period; and as the tendency of modern decisions is to regard persons who are concerned in contracts respecting land in the same light as to time as persons engaged in other contracts, the Master of the Rolls was inaccurate in

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overruling the demurrer, which he ought to have allowed. The demurrer was put in upon the authority of a case decided by the present Lord Chancellor, when a Vice-Chancellor, namely, that of *Parkin v. Thorold*, 2 Sim. N. S. 1; s. c. 11 Eng. Rep. 275, where his Lordship had held time to be of the essence of the contract, and dissolved an injunction which had been granted to stay trial of an action which had been brought for a return of the deposit. It must indeed be admitted that the Master of the Rolls did not assent to the view of Lord Cranworth, and that when *Parkin v. Thorold*, 22 Law J. Rep. (N. S.) Chanc 170; s. c. 13 Eng. Rep. 416, came on for hearing before him, he held that time was not of the essence of the contract. The reasoning, however, of Lord Cranworth, when that case was before him, shows, as do the cases cited in it, that the tendency of modern decisions is to hold that persons concerned in contracts relating to land are bound, as in all other contracts, to regard time as material.

[LORD JUSTICE KNIGHT BRUCE. Was *Lennon v. Napper*, 2 Sch. & Lef. 684, before Lord Redesdale, cited in this case, or in *Parkin v. Thorold* ?]

It does not appear that it was. The Master of the Rolls, from his observations, seemed to think this a better case for an appeal than *Parkin v. Thorold*.

[LORD JUSTICE KNIGHT BRUCE. Lord Redesdale, who was a perfect master of equity jurisprudence, in that case of *Lennon v. Napper*, which arose upon the subject of renewals in Ireland, before the Tenantry Act, (19 & 20 Geo. 3 c. 30,) lays down the law upon this subject with admirable perspicuity and precision. At page 684 he says, "The Courts in all cases of contracts for estates in land, have been in the habit of relieving, where the party from his own neglect had suffered a lapse of time, and from that, or other circumstances, could not maintain an action to recover damages at law: and even where nothing exists to prevent his suing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed: nor could, in many cases, the legal remedy be adequate to the demands of justice. Courts of equity have therefore enforced contracts specifically, where no action for damages could be maintained; for at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases, was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the Court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and, in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract."]

In all cases where the Court has relieved against time, it has been

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where it would have been inequitable to hold a party to time as essential to a contract or agreement between him and another, as in the case of a mortgage. There to hold a mortgagor to his contract to pay at a given time, or on failure to allow a forfeiture of the estate, would be clearly inequitable, because it would be making that an absolute sale, which was never intended to be more than a pledge, and the Court, in such a case, acts on the rule "once a mortgage always a mortgage," and gives the mortgagor a right to redeem: but that is very different from the case of an absolute contract for sale, in which the parties have stipulated, as they have done here, that the sale shall be completed at a given time, and with a view to that, that the abstract shall be delivered at a stated period.

[LORD JUSTICE TURNER. What you say as to mortgages is true, but the proper way of trying how far it applies, as an illustration of the case before the Court, would be to look at the reasons given in the very first case that occurred, in which the Court has relieved against time in the case of a mortgage.]

The early cases on the subject are collected in Mr. Coote's Treatise on Mortgages, but without an examination of them they may be referred to as an illustration of the reason for the Court's interference, and to contrast that reason with the present case. In the case of a mortgage, to hold a party to time would be manifestly hard and inequitable: to do so in the case of an absolute purchase, where there is no fraud, no surprise, no deception, would not be so. The vendor and purchaser deal on equal terms: and both agreed by the conditions of sale that the purchase should be completed at a certain time, and that stipulation has not been complied with.

Webb v. The Direct London and Portsmouth Railway Company, 1 De Gex, M. & G. 521; s. c. 9 Eng. Rep. 249, was also cited.

Teed and Hislop Clarke, for the plaintiffs, were not called upon.

LORD JUSTICE KNIGHT BRUCE. It might be sufficient to dispose of this demurrer, to say that the point may be better dealt with at the hearing than at this time. It does not, however, depend on that. The question is, whether, if the case were brought to a hearing, and the facts were either proved or admitted, and there were no other evidence in the case, and nothing in the answer to vary it, specific performance would be decreed. I think it would. There is nothing on the face of the contract to show that time is of importance; and, I apprehend, when time, from the nature of the case, is not shown to be of importance — of the essence of the contract — courts of equity have long been in the habit of relieving in such cases. I cannot express the rule better than by referring to the words of Lord Redesdale in *Lennon v. Napper*, that is to say, the Court will not relieve against the legal effects of lapse of time in such cases, provided that time is not made expressly of the essence of the contract, or there are other circumstances in the case which may render it so. The defendant must show that. It is not inconsistent with the present decision that upon the answer of the defendant, or upon the answer and evi-

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dence, the bill may be dismissed, especially in a case like this, where it is part of the defendant's case, that the time is limited within which the vendors were bound to furnish an abstract of title, and that the time is past. With regard to the fourth of the conditions of sale, one effect of that may be of importance with regard to the question before us; but, as the Court, upon demurrer, must take the whole bill to be proved or admitted, I am of opinion that this is a case for specific performance; I agree in the conclusion of the learned Judge, the Master of the Rolls, which is perfectly consistent with a case being made at the hearing, on which the bill may be dismissed, with costs.

LORD JUSTICE TURNER. The demurrer must be overruled. I think this ground alone, namely, that the delivery of the abstract was prevented by the accidental absence of the mortgagee on the continent would be sufficient to overrule the demurrer. I do not, however, shrink from saying that I concur with all that has fallen from Lord Justice Knight Bruce, that time may or may not be of the essence of a contract, by the stipulation of the parties, by the state of the property, or by surrounding circumstances; and that the question here being, whether it is made so by any of these modes, I am clearly of opinion that it is not. The doctrine of the Court is to look at the substance, and not at the mere form of a contract. Here the contract is in substance for a sale on one side and a purchase on the other; but it is not made essential that it should be completed at any particular time. The abstract, it is true, was to be delivered at a particular time, but it was not said that if the abstract were not delivered at such time, the contract was to be at an end; and the demurrer must be, therefore, overruled, and the appeal was rightly dismissed.

LADY BERESFORD v. DRIVER.¹

June 1, 1852.

Discovery — Delivery of Documents — Agents — Title Deeds.

Land agents paid by commission will be directed to deliver up such maps, plans, and other documents relating to the estates as were made or collected by them in the course of their employment, even though it is alleged that they were made for their own private use.

THIS bill was filed by Dame Amelia Beresford against Edward Driver and George Neale Driver, her former land agents and receivers,

¹ 22 Law J. Rep. (N. S.) Chanc. 407.

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to obtain a discovery of certain documents retained by them upon their being discharged, and asking for a decree that they might deliver up the several maps, plans, rent-rolls, field-books, books of lithographed plans and books of reference to maps and plans, and all other muniments and writings belonging or relating to the manor of Waterbeach, which were in their custody or power.

The defendants, by their answer, stated that they had given up all the documents of title, but admitted that they had the several documents stated in the two parts of the schedule to the answer as follows: First part. — A paper book, marked A, containing private rough memorandums and calculations, &c., made by the defendants for their respective private use as to fines assessed relative to the manor of Waterbeach. Memorandum book, marked B, containing private remarks of the defendants, or one of them, as to the estate, from 1829 to 1850. An old private memorandum book of the defendants. A private rental and cash book of the defendant, Edward Driver, and the late A. P. Driver, and of the defendants from 1819 to 1850. A field book made and kept by the defendants for their private use. Second part. — Two fair copy account books of the defendants, with memorandums of approval by the late Samuel Peach and the plaintiff, respectively marked F and G, with a bundle of vouchers, sealed up, relating to several of the accounts in the account books. Third part. — A bundle of letters and correspondence sealed up, and relating to the business transacted by the defendants for the plaintiff, the subject of an action pending at law brought by the defendants against the plaintiff. Fourth part. — Two copy bills as to the Bedford Levels, 7 & 8 Geo. 4, and a copy act, 53 Geo. 3, c. 107, as to inclosing lands at Waterbeach, and a copy parliamentary bill, 6 Geo. 4, relating to a new water-cut, King's Lynn, Norfolk, as to Bedford Levels. The fifth part contained a list of sixteen bundles of letters.

The plaintiff moved for the production of these papers, and on the 31st of July, 1851, the court ordered the defendants to produce them all, except those mentioned in the fourth part of the schedule. *Lady Beresford v. Driver*, 14 Beav. 387; s. c. 7 Eng. Rep. 25.

Lloyd and Shapter, for the plaintiff. The plaintiff now asks for a decree that Messrs. Driver may deliver up the documents. It is evident that all maps, &c., have been paid for in the commission charged. The calculations made by them were also for the benefit of their employer, and, having been dismissed from their office, they have no pretence for retaining any letter received from a tenant, or any paper relating to the affairs of the plaintiff or to the estate.

Roupell and Hallett, for the defendants. The documents were collected by the defendants for their own private benefit, as land-agents. They are not title deeds.

THE MASTER OF THE ROLLS. The plaintiff has a right to have the documents: they in fact form a part of her property. It may

Coppeard v. Mayhew. Powell v. Marett.

possibly be, that some are scheduled to which the plaintiff has no right; they can now be withdrawn: but until they were produced, it was impossible to decide to what the plaintiff's right extended. I must follow the plaintiff's right arising from this discovery, and as the defendants have not offered to relinquish their claim and give them up, I must make a decree for the delivery of the documents to the plaintiff, who is entitled to her costs of the suit.

The decree taken was for the delivery of the documents in the first part of the schedule, and the sixteen bundles of letters in the fifth part.¹

COPPEARD v. MAYHEW.²

January 27, 1853.

Claim — Counsel's Signature — Order to file.

The omission to print counsel's name upon a claim requiring his signature will not prevent its being filed.

BABINGTON applied for leave to file a claim, the specialty in which was to obtain payment of a legacy out of real estate; he had settled and signed it, but his name had not been printed upon the claim.

THE MASTER OF THE ROLLS. The omission of the printer is immaterial; you may take the order, as the claim has been duly settled and signed.

POWELL v. MARETT.³

March 7, 1853.

Lapsed Legacy — Rights of Executor to undisposed-of Personality — Rights of the Crown.

A testator, by his will, dated in 1822, appointed A (his widow) and B his executors, and gave B a legacy for his trouble, and bequeathed his personal estate to A and B, on the

¹ See *Swinborne v. Nelson*, 22 Law J. Rep. (N. S.) Chanc. 331; s. c. 15 Eng. Rep. 572.

² 22 Law J. Rep. (N. S.) Chanc. 408.

³ 22 Law J. Rep. (N. S.) Chanc. 408; 17 Jur. 449.

Powell v. Marett.

usual trusts for conversion, and directed that the income of the proceeds should be paid to A for life, and that after her death, his trustees, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of one half of the capital for A, her executors, administrators and assigns. A died in the lifetime of the testator. The testator had been illegitimate:—

Held, that the lapsed part of the testator's estate belonged to the crown, and not to B, the executor.

WILLIAM POWELL, by his will, dated the 7th of August, appointed his wife, Martha Powell, and John Marett, his executors, and gave John Marett a legacy of 20*l.* for his trouble as executor; and then devised all his real and personal estate to Martha Powell and John Marett, their heirs, executors, and administrators, on the usual trusts for sale and conversion, and directed that the proceeds should be invested in government or real securities, and that the income should be paid to Martha Powell for her life; and declared that, after her death, "his trustees, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of one half of the capital for such persons, &c., as Martha Powell should appoint, and, in default of appointment, for Martha Powell, her executors, administrators, and assigns."

Martha Powell died in 1842, in the lifetime of the testator, and William Powell died in 1846.

The testator was illegitimate.

The question in this suit was, whether the one half of the testator's residuary personal estate, which had lapsed by the death of Martha Powell in the lifetime of the testator, belonged to John Marett, the executor, or the crown.

Russell and *Renshaw*, for Mr. Marett, referred to *Middleton v. Spicer*, 1 Bro. C. C. 201, and *Taylor v. Haygarth*, 14 Sim. 8, cases in favor of the crown, but contended that the executor was entitled.

Wigram, *Bazalgette*, and *Briggs*, for other parties.

Wickens, for the crown, was not called upon.

STUART, V. C., said that he had been pressed with what Lord Thurlow had said in the case of *Middleton v. Spicer*, and he had observed how, in *Taylor v. Haygarth*, the Vice-Chancellor had stopped the counsel for the crown. He must consider the point as settled, and that the right of the crown was clear.

 Pennell v. Roy.

 PENNELL v. ROY.¹

March 5 and 9, 1853.

Injunction — Jurisdiction — English Bankruptcy — Scotch Proceedings against Assignees.

A Scotchman, who was resident and carried on trade in England, became bankrupt here, and subsequently succeeded to real estate in Scotland. The assignees under the bankruptcy possessed themselves of this real estate, as part of the estate to be administered under the bankruptcy, and they perfected their title according to the rules of the Scotch law. Mr. R., who alleged himself to be a creditor of the bankrupt, commenced an action in the Court of Session in Scotland against him, which was dropped, and another was brought against the assignees for the recovery of a dividend upon his claim, equal to the dividend paid and to be paid to the creditors under the bankruptcy, and in the latter action arrested the rents of the real estates in Scotland, of which the assignees had so possessed themselves so as to prevent them from dealing with that property. The assignees filed a bill against R. for an injunction to restrain him from proceeding with the action in the Court of Session :—

Held, overruling the decision of the court below, (where the injunction had been granted on the ground that the court had jurisdiction to restrain the proceedings,) that the injunction could not be sustained.

THIS case came on, upon an appeal from a decision of the Vice-Chancellor Kindersley, who had granted an injunction to restrain the defendant, Mr. Roy, who, as a trustee for other persons, had taken proceedings in the courts in Scotland against Mr. Pennell and another, the assignees of the estate of Mr. Archibald Campbell, a bankrupt. The facts, as stated in the narrative portion of his Honor's judgment, and which were admitted to be correct, were as follows:—An action was brought in the Court of Session in Scotland, in the year 1845, by Mr. Roy (who had been a writer to the signet) against a Mr. Campbell, contending that Mr. Campbell was his debtor to the amount of upwards of 3,000*l.*, in respect of certain transactions with regard to a bill of exchange. The particulars of the claim of Mr. Roy it is not necessary to enter into; it is sufficient to say, that he claimed this 3,000*l.* and upwards from Mr. Campbell. Mr. Campbell had previously carried on business in England, and had become bankrupt in England, and a commission of bankruptcy was pending against him when the action was brought; but being an uncertificated bankrupt, of course the bankruptcy did not prevent the right of a creditor to sue Mr. Campbell. That action went on for a considerable time; proceedings were had, and that action was still pending. In the course of that action the plaintiff, Mr. Roy, was desirous, if possible, of getting the assignees to be made parties to it, and, therefore, gave them notice that they might, what is called, *sist* themselves: that is, intervene in the action as if they were parties, and make themselves *quasi* parties defendants to that action. They declined to ac-

¹ 22 Law J. Rep. (N. S.) Chanc. 409; 17 Jur. 199; on appeal, 247.

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cept that offer, and, accordingly, in the early part of December, 1852, Mr. Roy commenced a separate action against the assignees; and the prayer of the summons in the court in Scotland was, in effect, this: it asked a declaration of the Court of Session, in the event of Mr. Roy establishing his claim in his action against Campbell, that he, Campbell, was a debtor to Roy in respect of the transactions connected with this bill of exchange, then that Mr. Roy was entitled to receive a dividend from the estate of the bankrupt Campbell, equal to the dividend or dividends drawn, or which should be drawn, by the other creditors of Campbell, and that the plaintiffs Kirkland and Pennell, the assignees of Campbell, should be decreed and ordained to make payment to Roy, the defendant, pursuer, as he is called in Scotland, of the sum of 3,000*l.* and interest thereon, or of such other sum as should be equal to the amount of the dividend or dividends drawn by the other creditors, on their respective claims; and that in the mean time the assignees should consign or deposit in bank, or otherwise secure in such manner as the court should ordain, the sum of 3,000*l.*, or such other sum as should be sufficient to meet the dividend; and that the defendants, the assignees, should be decreed to make payment to the pursuer of the costs of that action. That action being brought in December, 1852, a summons was executed, as it is called, or served with the proper summons in the nature of a subpoena, to bring the assignees before the court on the 17th of December; therefore, this action was constituted as between Mr. Roy and the assignees of Mr. Campbell.

On the 14th of January, 1853, this bill was filed by the assignees, praying an injunction, and praying nothing else, "to restrain Mr. Roy, his mandatories and agents, from prosecuting the action against them, the assignees, in the Court of Session, or against the real estate of Campbell, or the rents thereof; and from continuing, or permitting to continue or remain in force, the arrestments laid on as in the bill mentioned; and from laying any further or other arrestments on the rents thereafter to become due from the tenants of the estate of Locknell, in the bill also mentioned, (to which the bankrupt had succeeded after the date of the bankruptcy,) or suing out execution, or any other diligence or process against the real or personal estate of Campbell, the bankrupt."

The arrestments there referred to were arrestments which every pursuer in an action is entitled to take, not merely for the purpose of compelling appearance, but for the purpose of providing a fund to answer the demand of the plaintiff, if he should succeed in establishing it; and the arrestments have the effect of laying a sort of interdict upon the real and personal estate of the defender. Any real or personal property in Scotland, within the jurisdiction of the court, may be arrested, and is arrested by virtue of the arrestments, so that the owner of the property, the defender, cannot touch his own property, unless indeed by certain proceedings he gives security to answer the demand; and those arrestments were issued in the present case, and, as it appeared, the particular arrestments had issued under a special act of parliament which had recently passed, and which gave

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a particular efficacy, and put particular terms and conditions upon those arrestments not necessary to be now noticed. But the effect of the arrestments here put was this: that they prevented the assignees, until they gave security to answer the pursuer's demand in the action, from uplifting, that is, from receiving or getting in, any portion of the real or personal estate vested in the assignees, as assignees, within the jurisdiction of the Courts in Scotland.

The motion for the injunction was heard, before the Vice-Chancellor Kindersley, on the 14th, 15th, and 16th of February last, when his Honor granted the injunction in the term of the prayer of the bill. From that order Mr. Roy now appealed; and as this court has differed from the view of that learned judge, some passages of his elaborate judgment are stated in a note.¹

¹ "KINDERSLEY, V. C. — It does not appear to me that the cases entirely govern this case, such as *Graham v. Maxwell* and *Maclaren v. Stainton*, where this Court, administering an estate, says, a creditor shall not sue after a decree for administration, either in the courts of law in this country or in any court of any other country. That stands upon a footing of its own. But those cases go to this: although they do not govern this case, they establish at least this principle, that where a party has not chosen to come in when he might have come in, and when he would by coming in get his rights duly acknowledged and effectuated according to the law of the country which was administering the estate, — although he has not chosen to come in, — still, the court will not let him exercise the option of going elsewhere to try that right. It is true that there are cases in which the court, granting the injunction, is itself administering the equities and administering justice among the different parties. In this case the court is not doing so. In that respect, the case which is now before me is, I believe, a new case. I consider, therefore, that I am extending what I conceive to be a clear principle to a case to which it has not yet been extended. But it appears to me that there is equity enough in this, that the creditor here is admitting himself to be, and assuming himself to be, a creditor entitled to no other right whatever, as between him and the assignees, but a right to receive a dividend in the administration of the bankrupt's assets by those assignees, by virtue of the Court of Bankruptcy. He is admitting that throughout his whole proceeding and argument; and it appears to me that, upon the same principle, if he had come and proved his debt, got his debt allowed, or attempted to prove it and got it rejected, there is just as much equity to restrain him now from proceeding as he is now proceeding, as there would be, if he had come in and attempted to prove his debt, and that debt had been rejected, or even if that debt had been allowed. He might, if he had come in and proved his debt, have withdrawn his proof. Would this court allow him to withdraw his proof, and say: "I prefer having a certain portion of the assets which are in Scotland; as far as I am individually concerned, — not as far as the creditors generally are concerned, but as far as I am individually concerned — I should wish that a particular isolated portion of the assets should be distributed by another court for me only?" Now, it appears to me that this court will not only restrain the proceedings of parties who ought to come into this court and have their rights administered, but that it will, on the ground of equity, lend its assistance to the courts of competent and — as far as their jurisdiction extends and in respect of which it does extend — supreme jurisdiction, which have not of themselves the means of granting a similar injunction. Now, if I thought that, by restraining the action, I was doing any sort of mischief to Mr. Roy, that is to say, if there were any impediment in the way of his establishing his debt as any other creditor would establish his debt, I should be bound, of course, to take care that these impediments were removed out of his way: or, if they could not be removed, I certainly would not put him in a position in which he would be made subject to these impediments. . . . There is no difficulty in Mr. Roy coming in and proving his debt. I admit that that alone would not be a sufficient ground for saying, "If you have a right to go elsewhere you shall not go elsewhere." What I have to determine is, whether, under existing circumstances, he

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The principal cases cited in the court below were: — *Kennedy v. The Earl of Cassillis*, 2 Swanst. 313; *Bushby v. Munday*, 5 Madd. 297; *Harrison v. Gurney*, 2 Jac. & W. 563; *Attwood v. Banks*, 2 Beav. 192; *Frewin v. Lewis*, 4 Myl. & Cr. 249; *Maclaren v. Stainton*, 15 Eng. Rep. 500; *Graham v. Maxwell*, 1 Mac. & G. 71; s. c. 1 Hall & Tw. 247.

The appeal motion to discharge the order of the Vice-Chancellor and to dissolve the injunction now came on to be heard.

Bacon and *Giffard*, for the appellant. There is no equity to support such a bill as this, and the injunction ought never to have been granted. The value or not of the success in the Court of Session is not the matter to be discussed; at any rate, it will form no part of the reason for the court, on this appeal, refusing to discharge, if it shall refuse to discharge, the order of the court below. The Vice-Chancellor himself admitted that the case was a new one; but he relied, and it is respectfully submitted, erroneously relied, upon the fact bringing it within the principle adopted by the court in the exercise of its jurisdiction to interpose its authority against parties who proceed in a foreign court. Mr. Roy, in taking the step he did, has done no more than every man alleging himself to be a creditor had a right to do. He finds that there is real property in Scotland, and having offered the assignees the opportunity of intervening in the action, and they having refused and having neglected to conform to the requirements of the law, he has laid the arrestments on the rents, which will operate to secure the payment of his debt, and which debt he will be able to show is justly due. Mr. Roy owes no duty to this court in respect of this matter; he owes no observance to the assignees as acting under the bankruptcy jurisdiction in England, for he has not proved, nor offered to prove, his debt under the bankruptcy. The cases where the Court of Chancery has refused to support an injunction to restrain proceedings in courts in Scotland and elsewhere are numerous; that of *Kennedy v. The Earl of Cassillis*, and the valuable collection of cases in the note, are well known. This court will not exercise its extraordinary jurisdiction in such a way as to draw foreign litigation here, and it will always presume that foreign courts will decide according to the rules of justice, and will also take proper cognizance of the jurisdiction in bankruptcy, as well as every other jurisdiction in this country. If the injunction be supported, it will be

has a right to go elsewhere; whether he has a right to go in the manner in which he is going, by suing the assignees in Scotland. It appears to me that he is violating not only a principle of abstract justice but a principle of justice as administered by a court of equity; and except that a court of law does not grant injunctions — does not proceed by the same machinery — the justice would be as much recognized in a court of law as it would be in a court of equity. . . . Now, it appears to me, for the reasons I have stated, that, though I am extending to a new case, as I believe, the principles established in the other cases, I am not establishing a new principle. It appears to me I am only carrying out those principles already established to a case that comes within the mischief of those cases, although I am not aware that the precise case has ever been made the subject of decision."

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equivalent to a determination of this court that a creditor shall be forbidden to proceed in the prosecution of his legal rights in a foreign court, but shall be forced to prosecute them in a particular court in this country, or be precluded from recovering his debt at all, which is a course which, it is submitted, on the behalf of Mr. Roy, the Court of Chancery will not pursue, and that, therefore, it will dissolve the injunction.

[Other cases were referred to, and they will be found, with the authorities supporting the view of the appellant, in the case of *Maclaren v. Stainton*.]

The Solicitor-General, Anderson, and Karlake, in support of the Vice-Chancellor. From the judgment of Vice-Chancellor Kindersley it is to be collected, as undoubtedly is true, that in its facts and circumstances this case is new, but it seems equally clear that his Honor has only, as he alone intended to do, extended the principle of other cases to rectify a mischief which does not appear to have been before brought under the notice of the court. That the Court of Chancery will lend its aid, or will exercise its jurisdiction in aid of the Court of Bankruptcy, is plain, from the observations of Lord Eldon occurring in an *Anonymous case*, 14 Ves. 451, and in *Ex parte Bradley*, 1 Rose, 203, who says, that the different statutes relating to bankrupts seem to have been framed with a view to the authority with which the Lord Chancellor is intrusted in the exercise of his ordinary jurisdiction; and that when those statutes were silent as to the mode of compelling obedience to the orders that might be necessary for carrying their provisions into effect, the practice had been to enforce it by the general jurisdiction of the Court of Chancery, without which the objects of a commission of bankruptcy could not, in many cases, be thoroughly attained; and this practice, he thought, was perfectly consistent with the intention of the legislature, in giving the jurisdiction it has done to the Chancellor in Bankruptcy. This train of reasoning respecting the statutes relating to bankruptcy, and the exercise of the general jurisdiction of the court in enforcing obedience to orders made in pursuance of those statutes, is equally applicable to the present case, where the whole estate of the bankrupt being lawfully within the administrative power of the Court of Bankruptcy, a single alleged creditor has interposed to stop a part of the assets, and prevent their coming to the hands of the assignees for distribution among the whole body of creditors, himself among the number, if he thinks fit to conform to the requirements of the law by proving his debt in the ordinary manner. In the case of *Barker v. Goodair*, 11 Ves. 78, Lord Eldon granted an injunction to restrain proceedings on a foreign attachment which had been obtained in the Lord Mayor's Court, which had been commenced after a commission of bankruptcy against one partner. There the Lord Chancellor, in giving his judgment, says, "In the case of the judgment by a separate creditor, both the partners being solvent, it has been held, that the creditor may take by execution a moiety of a chattel, though he is only a separate creditor. A great variety of difficulties occur as to that; whether it

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stands in equity as at law. It is clear, a partner holds a chattel with his partner, subject to all the equities that partner has upon it." And then his Lordship goes on — "A question has often occurred, whether a separate creditor, taking a moiety of the chattel in execution, is in the same circumstances; namely, that he may call for a sale of that chattel, and divide the money: or whether this court would force upon him the whole account of the partnership; permitting him to take only that interest which the partner, his debtor, would have been entitled to, after the account. But we have gone much greater lengths in bankruptcy as to that; and even in the absence of the other partner. In bankruptcy, after one partner had become a bankrupt, I do not recollect that a joint creditor was ever permitted to bring an action, and by execution fasten upon a moiety of the effects. On the contrary, in the absence of the solvent partner, if, for instance, he was at Lisbon, we say, the assignees shall take the joint property, and deal with it as the partner himself ought to have dealt with it; paying all the joint creditors equally, as far as the joint property goes; and applying the surplus, if any, under all the equities subsisting between the partners themselves. This is done here every day; though how it originally became law I do not know. We have in some degree pursued it in the administration of assets, though very tenderly." In *Jones v. Geddes*, 14 Sim. 606, Sir Lancelot Shadwell held, that the Court of Chancery has jurisdiction to grant an injunction at the suit of the assignees of a bankrupt, to restrain proceedings in the Court of Session in Scotland, on a bond executed before the bankruptcy, against real estates there. There his Honor held, that the estate in Scotland belonged to the assignees, and that therefore the same ought to be administered under the fiat. At p. 619 of the same volume, is Lord Lyndhurst's written judgment on the appeal, the reasoning of which is importantly in favor of the respondents' view in the present case, although under the peculiar circumstances of that case his Lordship did not sustain the injunction granted by Sir Lancelot Shadwell. Lord Lyndhurst says: "The assignees in this case are entitled to the estate, subject to the rights of the persons holding heritable securities, and, among others, to the rights of the defendants in this suit. They stand, in this respect, precisely in the same situation as the bankrupt, whom they represent. Their claims may be enforced against the estate in the hands of the assignees, in the same manner as if it still continued in the bankrupt; the only difference being that, by the bankruptcy, the assignees have become owners of the estate instead of the bankrupt, and will be entitled, when the estate is sold under the process of ranking and sale, to the surplus, after payment of the charges upon it, instead of the bankrupt." And then his Lordship, after plainly stating that this court has jurisdiction, proceeds to consider whether the matter could, under all the circumstances of that case, be better administered here or in the Court of Session: and for the reasons there stated, he dissolved the injunction, although fully recognizing the principles for which the assignees now contend. In a recent case of *Macloren v. Stainton*, the present Master of the Rolls acknowledged, and acted on, the jurisdiction.

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The argument then proceeded on the inconvenience of a circuit of action if the court did not interfere, and assimilated the case to those where suits were commenced against executors after a decree had been pronounced under which a creditor could come in and establish his debt, and when the court undoubtedly would interfere by injunction. The following cases were then cited: *Booth v. Leycester*, 1 Keen, 247, 579; *Simpson v. Lord Howden*, 1 Keen, 583; *Graham v. Maxwell*, supra.

Bacon was heard in reply.

March 9. KNIGHT BRUCE, L. J. This case, which, if not wholly unimportant, is not of the importance that has been ascribed to it, occupied in discussion the whole time of this court on Saturday last, but was nevertheless well argued, by which I mean that every observation reasonably possible was included in what the court heard. The matter arose thus: a frivolous and vexatious suit was instituted in Scotland, without, as I believe, the least chance of success. The defendants, instead of meeting it there, instituted here the suit now before us, one as frivolous, I think, though less vexatious, for the purpose of staying the other; they made a motion accordingly before a learned Vice-Chancellor, and obtained the order they desired; with which one might have supposed their adversary, the defendant here, pursuer in Scotland, likely to be also well content. But no, the attractions of a desperate Scotch lawsuit seem more powerful than one would have guessed. A Scotch advocate, as he had been, *agnovit veteris vestigia flammæ*. The Court of Session had only pleasing alarms for him. Rejecting the hand offered to extricate him from what he had fallen into, he chose to remain in, and so has brought before us this appeal, which, as I have said, it was our fortune to hear during an entire judicial day; and which we are now to dispose of.

Few facts need be mentioned. A Scottish gentleman, resident and carrying on business in England, was duly made a bankrupt in England, part of his property consisting of real estate in Scotland. The estate was possessed accordingly by the assignees; who, upon that right, completed and perfected their title to it according to the forms and regulations prescribed by the law of Scotland. The defendant, Mr. Roy, is, or claims to be, a creditor of the bankrupt; and, under such circumstances as that, if Mr. Roy's case is true, he was, and is, entitled to be, on his application, admitted to prove a large debt under the English bankruptcy, which, however, he has never done or claimed, or attempted to do to any extent whatever; and he has not in the Scotch proceedings already mentioned and to be mentioned again, or otherwise, alleged that he has ever so proved, or claimed, or attempted, or that he intends or wishes to do so; he is in truth absolutely a stranger to the bankruptcy. In this state of things Mr. Campbell, the bankrupt, not having obtained his certificate, has, since his bankruptcy, been sued for the debt in Scotland by Mr. Roy, who, as to that proceeding, thought fit to *sist* as parties defendants, the assignees

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under the English bankruptcy ; and is pursuing them accordingly in the Court of Session, for the purpose of recovering payment, from them or the bankrupt's estate, of a dividend on the debt alleged, and perhaps truly alleged, to be due to Mr. Roy from the bankrupt *pari passu* with the creditors who have claimed, and been admitted under the bankruptcy. The assignees not having appeared, he has resorted to arrestments, under which the land in Scotland already adverted to has been and still is very inconveniently affected. By this experiment, this course, of which I am unable to discover the hopefulness or the propriety, have been occasioned the bill and the injunction before us ; and the question now is, whether the assignees are entitled to file a bill in the English Court of Chancery to restrain Mr. Roy from these measures.

How the case would have stood if he had proved or claimed, or alleged himself to have proved or claimed, or to intend to prove or claim, under the English bankruptcy, it is unnecessary to say ; but, as the facts are, I see nothing to support such a bill. If it is assumed that he ought to succeed in the Scotch proceeding, he ought not to be interfered with here. The contrary assumption, as I conceive, cannot give an equity to the assignees as plaintiffs against him. It is not a duty or function, or within the province of this court to restrain men from prosecuting litigious, frivolous, and desperate suits, merely because they are so, at least, unless the experiment should have been repeated once or twice, which is not the case here. A creditor who has not proved or claimed, nor seeks to prove or claim, under an English bankruptcy, is under no more obligation, nor owes any more duty to the assignees or to the other creditors, than he would if he were no creditor at all ; and, consequently, if he enters into a frivolous or perverse litigation with the assignees, they must defend themselves as other men do when persecuted by the owner of an imaginary grievance. In the present case Mr. Roy, entitled to no dividend, claims from the assignees a dividend in a manner that would be irrational and absurd if he were entitled to a dividend ; but how does this confer upon them any privilege, — if a chancery suit be a privilege, — beyond others of the Queen's peaceable subjects tormented by fanatic litigants ?

Something was said of circuitry ; and Mr. Anderson, I think, referred to the maxim of the civil law, *dolo facit qui petit quod redditurus est*, or, as it is otherwise given, *dolo facit qui petit quod restituere oportet eundem*. But, though I am not aware of any complimentary designation that Mr. Roy's proceedings against the assignees in Scotland can deserve, I am also not aware that there is or has been *dolus*. Were he, through the assignees' default, or (as it seems to me impossible to suppose) on the merits, to obtain from the Court of Session payment of a dividend or debt from the assignees, or out of the Scotch real estate, and the House of Lords should not be appealed to, or should not dissent from that decision, I do not see how there is ever to be restitution.

Another endeavor was made on Saturday to establish a proposition laid down at the bar, of a close analogy, if not identity, between the

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present demand on the court, and that of an executor or administrator sued by a creditor, or an alleged creditor, of the deceased, after a decree, under which all his creditors may come in. If the analogy existed, I do not know that it would, therefore, be right for the court to interfere in a case such as the present; for there is clearly in my opinion, no such analogy. The duties of an executor or administrator, — the manner in which he represents the deceased, — the extent to which, and the mode in which, he is by law liable to be sued by a creditor of the deceased, — the different defences and judgments possible in an action against the executor or administrator, — the right which he has to deliver himself from a suit against him, if he cannot do so otherwise, by applying assets for the purpose, — and the title which the creditors generally acquire by a decree to those assets, — are alone obviously sufficient to destroy all ground of comparison between the cases.

If Mr. Roy, instead of proceeding in Scotland, had been advised or permitted to commence a suit in Ireland, or in the Court of Queen's Bench here, or in the County Palatine of Lancaster, for the strange purpose for which he has *sisted* the assignees, and under the same circumstances, could a bill have been filed there to stay it? I apprehend certainly not; in the absence, at least, of a vexatious repetition of unsuccessful litigation. The same rule must apply to Scotland, the courts of which are bound to notice, and do not refuse or hesitate to notice, the English bankrupt law. I differ, nor need I say I most respectfully differ, from the able and excellent judge before whom this cause has been; and I think that, as according to another maxim of the Civil Law which we adopt, *invito beneficium non datur*, we are justified in visiting the appellant with success in his appeal.

TURNER, L. J. I also am of opinion that this injunction cannot be maintained. The plaintiffs are the assignees of Mr. Campell, an uncertificated bankrupt, and the case they state by their bill is shortly this: that the defendant, who is resident in this part of the kingdom, alleging himself to be a creditor of the bankrupt, but not having proved his debt under the bankruptcy, has brought an action in the courts of Scotland against the plaintiffs, the assignees, for the recovery of a dividend equal to the dividend paid and to be paid to the creditors under the bankruptcy, and has in that action arrested the rents of some real estates in Scotland to which the assignees are entitled under the bankruptcy. The equity on which the bill rests is, that the Court of Bankruptcy in England is the proper court for proving debts or alleged debts against the estate of the bankrupt, and that the bankruptcy being in England, the administration of the estate will be embarrassed if the documents relating to the transactions, connected with the alleged debt, be removed to Scotland. The novelty of the equity thus set up, and the great respect which I feel for the opinion of the Vice-Chancellor, induced me to hesitate before pronouncing any opinion on the question before us; but the further consideration which I have given to the case has confirmed the impression which I felt during the argument, that this equity cannot be maintained. The case was

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admitted by the learned judge in the court below, and has been admitted in the argument at the bar of this court, to be new in its circumstances; but both in the court below and in this court, it was said to fall within the principle of other decided cases.

The cases relied on in argument were an *Anonymous case* and *Bradley's case*, from which it was attempted to be deduced that a court of equity would exercise its jurisdiction in aid of the court of bankruptcy; but those cases go no further than that the fact of the bankruptcy jurisdiction having been intrusted to the Lord Chancellor, justified the conclusion that, where the bankrupt statutes were silent, he could exercise in bankruptcy the jurisdiction which he had as Lord Chancellor; and they do not at all show that, in the absence of equitable circumstances, on which to found its jurisdiction, a court of equity, as distinguished from the Lord Chancellor, sitting in bankruptcy, would interfere in aid of the bankruptcy jurisdiction. The other cases mainly relied on on the part of the respondents were, *Barker v. Goodair* and *Jones v. Geddes*; but in each of those cases there were circumstances amply sufficient to call forth the jurisdiction of a court of equity without reference to its being invoked in aid of the bankruptcy jurisdiction. In the former case, there was the question whether the attaching creditor was, as against the assignees of the bankrupt partner, to be confined to his interest in the surplus of the joint estate, including, therefore, the account of the partnership; and there was besides a necessity for the interference of a court of equity for the purpose of releasing the goods which had been attached. In the latter case, there was fraud distinctly alleged. The cases in which this court interferes to restrain creditors from proceeding either in the courts of this country or in foreign courts, for the recovery of their debts against executors, were also referred to on behalf of the respondents, but those cases do not seem to me to aid this case. This court does not in such a case interfere, as it is called upon to do in the present case, by decree; and its interference after decree is, as I apprehend, founded upon this: that the decree is a judgment for all the creditors. Besides, this court has, by its decree, the complete control of the suit, and it would not permit its jurisdiction to be interfered with. None of the cited cases, therefore, by any means support the general position for which the respondents contend.

We must look back, then, to the root of the jurisdiction for the purpose of seeing whether that position can be maintained; and upon examining it I am satisfied it cannot. Lord Redesdale, in his *Treatise on Pleading*, has traced and classed the grounds of the jurisdiction of courts of equity, and he has divided them into two classes: one where the court is called on to decide on the right to property, the other where it is called on to interfere without deciding on any such right. With reference to the first class, he says, that the jurisdiction exists where the law gives a right, but does not afford a sufficient remedy, or where the powers of the law are abused, or where the law gives no right, but the principles of universal justice require the interference of judicial power. And with reference to the second class, he thus describes it, (Mitford on Pleading, 4): "The courts of equity also ad-

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minister to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence, which may enable other courts to give their judgment; and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation." These are, as I apprehend, the true principles by which the jurisdiction of this court is bounded; and I find nothing in them at all resembling the case put forward by this bill.

This is not a case in which this court is called upon to decide on a right of property; and the bill does not, in my opinion, bring the case within any of the cases put by Lord Redesdale as furnishing grounds for the interference of the court where no right of property is to be decided. The case presented by this bill is, I think, simply one of interference by a stranger with the property of another in a mode which is warranted by the law of a foreign country upon the assumption of right. There may, or there may not, be a foundation for that right. So far as I can see, there is none; but whether there is or is not foundation for the right, I think there is no foundation for the interference of this court. If we were to maintain this injunction, we should, I think, be greatly extending the jurisdiction of this court under color of carrying out its principles. If we were to maintain this injunction, we should, as it seems to me, be assuming jurisdiction in this court to prescribe the court in which parties should bring their suits, without there being any thing to affect the conscience of the parties, and on the simple ground that the suits were such as, in the opinion of this court, ought not to be maintained; and we should be thus bringing under the decision of this court the question, whether those suits should be maintained, a question which it is for those courts, and not for this court, to decide. To assume such a jurisdiction, would be to exercise a legislative and not merely a judicial power.

Some attempt was made to maintain the injunction on the ground of circuitry of action: but I do not think that ground can be made available in such a case as the present.

The ground of inconvenience was also urged in support of the injunction; but I think that the question of convenience applies only where there are two courts having jurisdiction, and does not extend to the present case.

I have the less hesitation in discharging this order, because, in my opinion, it is, as was expressed by Lord Eldon, in *Wright v. Simpson*, 6 Ves. 714, the duty of this court to give credit to foreign courts for doing justice within their jurisdiction; and I have no doubt that, if

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the claim of the defendant against the assignees be as unfounded as it appears to me to be, the court of Scotland has full power to discharge, and will at once discharge, the arrestments.

The order of the Vice-Chancellor was then discharged.

GURNEY v. JACKSON.¹

December 9 and 10, 1852.

Mortgage — Foreclosure Suit — Disclaimer — Costs.

In a foreclosure suit, the bill alleged that the plaintiff, the first mortgagee, had applied to the defendants, who were subsequent mortgagees, to pay his mortgage debt and interest, and that they had refused so to do. The defendants, by their answer, stated that the plaintiff had not made any application to them, and that, if he had, they would have released and disclaimed all interest, and they then disclaimed. At the hearing of the cause:—

Held, that the plaintiff was bound to pay the defendants their costs.

THIS was a foreclosure suit by the first mortgagee against subsequent mortgagees and the mortgagor. The bill stated "that the plaintiff had applied to the defendants to pay his debt and interest, and that the defendants had refused so to do," and contained the usual interrogatories founded on this statement.

The defendants, the subsequent mortgagees, put in a disclaimer and answer, in which they stated "that they disclaimed all right, title, and interest to, or in, the mortgaged lands and hereditaments in the said bill mentioned, and every part and parcel of the same;" and that "no application was ever made to them by, or on behalf of, the plaintiff prior to the institution of the suit respecting the matters in question in the suit; and that, if the plaintiff had so applied, they would have released and disclaimed all right and interest to, and in, the said mortgaged lands and hereditaments, and every part and parcel of the same."

The cause now came on to be heard. The only question was as to the costs of the disclaiming defendants.

Rasch, for the plaintiff.

Freeling, for the defendants, contended that their costs ought to be paid by the plaintiff.

The following cases were cited. *Collins v. Shirley*, 1 Russ. & Myl.

¹ 22 Law J. Rep. (N. S.) Chanc. 417; 17 Jur. 204.

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638; *Silcock v. Roynon*, 2 You. & C. C. C. 376; *Perkin v. Stafford*, 10 Sim. 562; *Gibson v. Nicol*, 9 Beav. 403; *Buchanan v. Greenway*, 11 Beav. 58; *Grigg v. Sturgis*, 5 Hare, 96; *Gabriel v. Sturgis*, *Ibid.* 97; *Ohrly v. Jenkins*, 1 De Gex and S. 543.

STUART, V. C., said that he thought that this was a very important question, and to be disposed of on a principle which was not touched by any of the authorities cited. The defendants insisted upon their right to the costs, not upon the ground of their not being necessary parties, but because, if they had been applied to before the bill was filed, they would have submitted to the plaintiff's demand. The answer was distinct, "that if the plaintiff had so applied, they would have released and disclaimed all right and interest." The plaintiff, by the bill, made it a part of his case, and put in issue the fact that he had applied to the defendants and requested them to pay the mortgage debt and interest; and interrogatories were put to the defendants, whether they had not been so applied to. It was very true that these were common words; but they were common words used for a wise purpose. At law, if a man sued out a writ, and the demand was immediately paid, the costs would follow, as no previous application for the debt was necessary. • An entirely different course, however, was pursued in this court, and, under the old mode of pleading, the forms used were not senseless ones, but were wisely adopted according to the established principles of the court. The words were introduced to guide the court in its discretion in dealing with the costs; for, if a man were willing to accede to a demand, and were dragged into court without a previous application, such a circumstance was important upon the question of costs. It had been urged that the application alleged to have been made to the defendants was to pay the money, but that their answer said, not they would have paid, but that, if applied to they would have released and disclaimed all right and interest. But, if they had thus released and disclaimed, they need not have been brought here. A bill of foreclosure was said to have been called a bill to recover a sum of money, and Mr. Rasch appealed to a number of authorities in support of that. In all of these authorities, however, the substantial question was, not upon the effect of an averment of an application, but upon how a party who disclaimed should be dealt with at the hearing. Had there been here only a simple disclaimer, I do not consider that I should have any reason for calling upon the plaintiff to pay these defendants their costs; but as no previous application had been made by the plaintiff, he must pay the costs of these defendants.

THE ATTORNEY-GENERAL v. THE CORPORATION OF EXETER.¹

December 22, 1851.

Lords Justices — Jurisdiction — Order of Lord Chancellor.

There is jurisdiction in the Court of Appeal (under the statute 14 & 15 Vict. c. 83,) to correct an error in an order of the Lord Chancellor.

THE application in this case was to correct an error in a decree of the late Lord Cottenham when Lord Chancellor.

Rolt and *Fooks* appeared to support the application.

Bethell, for other parties.

KNIGHT BRUCE, L. J. As this appears to be an application to cure an alleged error in an order of the Lord Chancellor, speaking for myself only, and not doubting our jurisdiction to hear it, I think it had better be mentioned to the Lord Chancellor. I do not entertain any doubt of our jurisdiction under the act of parliament establishing this court; but I think it might lead to the greatest inconvenience if we were to undertake to hear such a matter. I say this independently of all feeling of delicacy which could be involved.

LORD CRANWORTH, L. J. I at first doubted whether the jurisdiction in fact did exist; but having looked at the act of parliament I am satisfied it does. The only question then is, as has been mentioned by my learned brother, whether, as a matter of propriety and delicacy, we ought to hear the case. It would be far more properly heard before either the Lord Chancellor, or before the full court of appeal.

KNIGHT BRUCE, L. J. If we were to hear applications to correct errors in an order of a Lord Chancellor, or of the Lord Chancellor, the whole intention of the statute would be disappointed. In fact, we might have cross appeals from this court to the Lord Chancellor's court, and from that court to this. Application had better be made to the Lord Chancellor. We have every inclination to take every case we can. We know the number of matters which the Lord Chancellor has to dispose of, and which no one but the Lord Chancellor can hear; but still, without denying the jurisdiction, we think it would be a case of very great difficulty and delicacy to interfere with an order made by his lordship's predecessor. Let the matter be mentioned to his lordship.

¹ 22 Law J. Rep. (N. S.) Chanc. 418.

Ex parte The Local Board of Health of Llanelly.

Ex parte THE LOCAL BOARD OF HEALTH OF LLANELLY.¹

January 29, 1853.

Statute — Public Health Act, 11 & 12 Vict. c. 63 — Body Corporate.

Upon a petition presented by the Llanelly Local Board of Health, it was held, that the local board was not a body corporate under the Public Health Act, 11 & 12 Vict. c. 63; and must sue in the name of their clerk, as directed by the 138th section.

THIS was a petition, presented by the Local Board of Health of Llanelly, for payment out of court of the dividends upon a sum of money paid in by the South Wales Railway Company under the Lands Clauses Consolidation Act, upon the purchase of certain land which had originally been vested in the trustees and burgesses of the town of Llanelly, but had since been vested in the petitioners by the General Board of Health, under the powers given them by the "Act for promoting the public health," 11 & 12 Vict. c. 63.

A question arose upon the construction of the petition as to whether the petitioners, the Local Board of Health of Llanelly, were a body corporate.

Renshaw, in support of the petition, contended that it was properly presented on behalf of the Local Board of Health; that they were a body corporate, and treated as such in many of the sections of the act of the 11 & 12 Vict. c. 63. The 37th, 84th, and 138th sections were referred to.

KINDERSLEY, V. C. In many respects this act is very singularly drawn, and the question is left in great doubt. It seems odd that if the Local Board of Llanelly are to be considered as a corporate body, there should be no words expressly constituting them such. In the interpretation clause, it is enacted that "the expression, 'the local Board of Health,' shall mean the persons authorized to execute in each district all or any of the powers, authorities, and duties vested in or imposed upon the Local Board of Health, by this act;" but it is left in doubt as to what they are to be considered. There is no direction that they shall be a body corporate, or that they shall use a common seal. In the 138th section, this clause is inserted:—"That the Local Board of Health of any non-corporate district may sue and be sued in the name of the clerk, for the time being, for or concerning any contract, matter, or thing whatsoever relating to any property, works, or things, vested or to become vested in them by reason of the provisions of this act." This clause appears to be quite inconsistent with their being a body corporate, because it would not then

¹ 22 Law J. Rep. (N. S.) Chanc. 419; 17 Jur. 107.

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be necessary to enable them to sue by their clerk, as they could sue in their corporate name. I do not see how, under this act, the petitioners can be a corporation, and, therefore, the petition is not rightly framed. The proper course would be to present the petition, in the name of the clerk, and have the money paid to the treasurer, for the time being, if there is one.

MIDDLETON v. LOSH.¹

November 16 and December 15, 1852.

Thellusson Act — Portions.

A, the mother of B, by her will, directed trustees to invest 50,000*l.*, and to pay a competent part of the income for the benefit of B, for his life, and to invest the surplus of the income, to the intent that it might accumulate for the benefit of the persons who, under the will, should be entitled to it; and, after the death of B, to apply the said sum and accumulations, or a competent part, for the children of B, during their minorities, or until their portions should become payable; and, when the children should attain twenty-one, to divide the said sum and accumulations among such children equally. A died in 1831. B was living:—

Held, that the trust for accumulation came within the exception to the 2d section of the Thellusson Act, and was not void.

Mrs. BEAUMONT, by her will, dated the 20th of August, 1829, directed her trustees, therein named, to stand possessed of 50,000*l.*, upon trust to invest the same as therein mentioned. The will then proceeded as follows;—“And to pay, apply, and dispose of a competent part of the interest, dividends, and annual proceeds of such investments for the maintenance and support of my son William, and in providing him a suitable establishment according to his circumstances and station in life; and also to pay and discharge all the reasonable charges and expenses of the said trustees in superintending and managing the establishment and affairs of my said son William: and upon further trust, from time to time, to invest and place out the surplus of the interest, dividends, and annual proceeds thereof upon government or real securities, to the intent that the same may accumulate for the benefit of the persons who, under my said will, shall become entitled thereto: and, from and after the decease of my said son William, upon further trust to pay, apply, and dispose of the interest, dividends, and annual proceeds of the said sum of 50,000*l.*, and the accumulations thereof, or a competent part thereof, in the maintenance, education, and establishment of all and every the child and children of my said son William, lawfully to be begotten, during their respective minorities, or until their portions shall become payable under this my will; and,

¹ 22 Law J. Rep. (N. S.) Chanc. 422; 17 Jur. 175.

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when and so often as the children of my said son William, if a son or sons, shall attain the age of twenty-one years, or, if a daughter or daughters, shall attain the said age or be married, then upon trust to call in and receive the said sum of 50,000*l.*, and all interest, dividends, and annual proceeds and accumulations thereof, and to pay and divide the same unto and amongst all and every the child and children of my said son William, lawfully to be begotten, if more than one, equally, share and share alike; and if but one, then to such one child, his or her executors or administrators; the share or shares of such of the children of my said son William, being a son or sons, to be paid by him or them on attaining the age of twenty-one years, or, being a daughter or daughters, to be paid to her or them on attaining the like age or marriage."

The testatrix then directed that, in the event of the death of her son William without children, the trust fund and accumulations should go to the persons therein mentioned.

Mrs. Beaumont died in August, 1831. William Beaumont, the son, was a lunatic.

The question in this suit was, whether the trust for the accumulation of the surplus interest for the benefit of the children of William was void after the expiration of twenty-one years from the death of the testatrix, or whether it came within the exception contained in the 2d section of the Thellusson Act, 39 & 40 Geo. 3, c. 98.

This section is as follows — "That nothing in this act contained shall extend to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise; but that all such provisions and directions shall and may be made and given as if this act had not passed."

Russell and Bates, for the plaintiffs (the trustees).

Bacon and Nalder, for William Beaumont.

Wigram, Follett, Chandless, Hardy, and Brodrick, for the next of kin of Mrs. Beaumont.

Manlins and J. H. Palmer, for the persons entitled under the gift over, on William Beaumont's death without children.

The following cases were cited:—*Haley v. Bannister*, 4 Madd. 275; *Crawley v. Crawley*, 7 Sim. 427; *Miles v. Dyer*, 8 Sim. 330; *Fyre v. Marsden*, 2 Keen, 564; *O'Neill v. Lucas*, 2 Keen, 313; *Elborne v. Goode*, 14 Sim. 165; *Beech v. Earl St. Vincent*, 19 Law J. Rep. (n. s.) Chanc. 130; *Morgan v. Morgan*, 20 Law J. Rep. (n. s.) Chanc. 109; s. c. 2 Eng. Rep. 35; *Bourne v. Buckton*, 2 Sim. N. S. 91; s. c. 9 Eng. Rep. 144; *Trickey v. Trickey*, 3 Myl. & K. 560; *Webb v. Webb*, 2 Beav. 493; *Jones v. Maggs*, 9 Hare, 605; s. c. 10 Eng. Rep. 159; *Lord Barrington v. Liddell*, 32 Law J. Rep. (n. s.) Chanc. 1; s. c. 13 Eng. Rep. 445.

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STUART, V. C. The questions in this case related to the construction of the Thellusson Act, as applicable to the direction in the will of Mrs. Beaumont, for the accumulation of the interest and annual proceeds of a sum of 50,000*l.* during the life of her son, W. Beaumont. The first question, and, in my view of the case, the only question which it is necessary to consider is, whether the trust for accumulations is within the exception in the second section of the statute, which exempted from its operation provisions for raising portions. The first trust of the annual proceeds of the 50,000*l.* is, for the maintenance and support of her son William, and, as to the surplus of the annual proceeds, the trust was to accumulate them, and, after the death of William, to dispose of the proceeds of the 50,000*l.* and the accumulations, or a competent part thereof, for the maintenance and education of the child and children of her son William during their respective minorities, or until their portions should become payable under that her will; and as soon as they, if sons, should attain the age of twenty-one years, or, if daughters, attain that age or be married, then upon trust to call in the 50,000*l.* and all the accumulations, and pay and divide the same among all the children of William in the manner particularly directed in the will. When the testatrix spoke of the portions payable under the will to the children of William, it must refer to the gift to them of the 50,000*l.* and the accumulations. The words of the second clause in the statute, which are applicable to this case, are those which mention "any provision for raising portions for any child or children of any person taking any interest under such conveyance, settlement, or devise." The children provided for by Mrs. Beaumont out of these accumulations were the children of her son William, who took an interest under her will. This provision, to which the accumulations were dedicated by their grandmother, she described as their "portions;" and, so far as appears, was the only provision made for them. Therefore, if the question came to be considered without reference to decided cases, upon the construction of this clause in the act, there would seem little difficulty in holding that this was the case of a trust for accumulation, or a provision for raising portions for the children of a person taking under the will which directed the accumulation; that it was within the exception in the second section; and, therefore, not to be restricted to the statutory period of twenty-one years from the death of the testatrix.

But there are decisions recorded, by judges of learning and experience, which afford countenance to the arguments urged in this case in support of the proposition, that the trust for accumulation in this will is not within the exception as to provisions for portions, and that, for the excess beyond the period of twenty-one years, the first trust for accumulation was invalid. The decision of Lord Langdale, in *Eyre v. Marsden*; of the Vice-Chancellor Knight Bruce, in *Morgan v. Morgan*; of the Vice-Chancellor Kindersley, in *Bourne v. Buckton*; of the Vice-Chancellor Turner, in *Jones v. Maggs*, have all been quoted and relied on in the argument to support the construction, that the accumulation directed by Mrs. Beaumont's will of the

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50,000*l.* was not within the exception made by the second section of the act, as to portions; and, no doubt they are all authorities in support of that construction, for they all proceeded upon the principle of narrowing, on various grounds, the construction of the words in the 2d section as to portions. The current of decisions on those questions had set strongly in favor of a confined and narrow construction, that in the latest case on the subject, *Lord Barrington v. Liddell*, the Vice-Chancellor Turner, yielding to its force, and pressing it to the utmost possible degree of narrowness, held that the meaning of the word "interest," which the parent of the portioned child must take, to come within the exception in the second section, must be an interest in the same property, the income of which was directed to be accumulated. Of the cases quoted at the bar, the decision of the Vice-Chancellor Knight Bruce, in *Beech v. Lord St. Vincent*, alone proceeded on what seems to me a just view of the construction to be put on the exception as to portions.

On the best opinion which I am enabled to form, it seems to me, after hearing the arguments and authorities in the present case, that the trust for accumulation is a valid trust to the full extent directed by Mrs. Beaumont's will, and that, notwithstanding the current of authorities in favor of the narrow principle of construction, the case is within the exception as to portions. This opinion I expressed, but, at the same time, with a feeling of diffidence, considering the weight of authority on the other side. But as it was stated to me, that the decision of Sir George Turner had within the last few days been argued, on appeal, before the Lord Chancellor, and that his lordship's judgment was expected to be delivered in a few days, I postponed the judgment in the present case that I might be guided by the Lord Chancellor's opinion. Having now had an opportunity of reading the note of his lordship's judgment, it is a great relief and satisfaction to me to find, and I am sure it will be a satisfaction to every sound and enlightened lawyer to find, that, upon a masterly review of these authorities which so unfortunately confined, narrowed and embarrassed the construction of the exception as to portions, the Lord Chancellor, if he has not restored, has at least established, a just principle of construction, and has held the trust for accumulation, in the case of *Lord Barrington v. Liddell*, to be valid and within the 2d section of the Thellusson Act. The trust in that case, for the accumulation of 15,000*l.*, was not created by a parent, and was not directly to raise portions, but was to accumulate a fund to relieve the family estates from portions provided by the marriage settlement of the great nephew of the testator. In the present case, when the provision was by an accumulation directed by a parent for the benefit of a son, and expressly as portions for his children, the son taking an interest in the same fund, and the whole being a provision in lieu of the son's portion under the marriage settlement and the father's will, I am bound, by the principle of the decision in *Lord Barrington v. Liddell*, independent of my own clear opinion, to hold that the trust for accumulation is valid, and is not restrained by the statute to the period of twenty-one years. The decree must, therefore, contain a declaration to that effect.

Jones v. Beach.

JONES v. BEACH.¹

December 16 and 17, 1852.

Principal and Surety—Promise to Pay—Liability joint, whether made several.

A surety, in answer to a letter informing him that proceedings were contemplated against him and his principal, stated, through his solicitor, that he would in a post or two pay the amount and interest due on the joint security. The surety died, and the creditor sued the administratrix of the surety, and it was held at the Rolls that the letter was a promise to pay, for which the forbearance to sue was a sufficient consideration: but on appeal:—

Held, that the surety had, neither at law nor in equity, rendered himself severally liable.

THIS was an appeal from a decision of the Master of the Rolls. The particulars of the case are reported fully, 21 Law J. Rep. (N. S.) Chanc. 543; s. c. 11 Eng. Rep. 200, and as they are incorporated in the judgment of Mr. Justice Maule, it is needless to repeat them here. The same cases were cited and relied on as had been cited at the Rolls.

J. H. Palmer appeared in support of the decree at the Rolls.

Willcock and *C. Hall*, for the appellant, were not called upon.

KNIGHT BRUCE, L. J. If the separate liability at law is established, the equitable right will follow; but supposing no such legal liability to exist, the question of liability in equity will depend on whether there is evidence, direct or circumstantial, that the joint note does not accurately express the intention of the parties concerned in the transaction, and that there is a contract, independent of the note, binding Beach in equity. I am not prepared to say that the circumstance of a joint security leads to the inference that it was meant to be joint and several; Beach agreed to be surety for Stubbs to Jones; but there are two ways of his being so, and the evidence does not show that a joint and several liability is the way intended. It is said that the transaction is equivalent to a joint loan, and that, therefore, a several as well as a joint liability is created. This is a point not needful to be now decided; but I should not be disposed to adopt the view suggested unless after great consideration. On the materials in the case, and on general principle, there does not appear to be any equitable liability distinct from the legal liability; and, therefore, if there is no separate liability at law, the claim must fail.

LORD CRANWORTH, L. J., concurred.

¹ 22 Law J. Rep. (N. S.) Chanc. 425.

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KNIGHT BRUCE, L. J. As to-morrow we shall have the advantage of Mr. Justice Maule's assistance in another case, this had better be in the paper; and then the question, whether Mr. Beach, on the letters which have been read, became at law jointly and severally liable with Mr. Stubbs, for this sum of money, can be argued.

December 17. Counsel having been heard this day, at the conclusion of their argument, judgment was delivered.

MAULE, J. In this case it is alleged that Mr. Beach being liable on certain joint promissory notes with Stubbs, who has become bankrupt, his estate is to be charged in respect of a several liability not arising out of the promissory notes. Under the notes the estate of Mr. Beach could not be liable; that has not been contended; but the liability is alleged to arise on certain letters. The first letter is from the solicitor of the plaintiff to Mr. Beach, and is dated, Droitwich, June 20th, 1850, and is as follows: — "Sir, Mr. Stubbs is here, and I am about making him a bankrupt; but I find I cannot proceed against him without coupling you in the affair. I have no desire to proceed against either, and in order to avoid this I ask you whether you will join Mr. Stubbs in a fresh note for 300*l.*, payable jointly and severally. As the notes in my possession are made payable on demand, and are not jointly and severally, you had better see your solicitor hereon immediately. I shall await your reply a post or two, and if I have no reply I shall at once proceed against both of you." This letter contains an offer to change the joint debt into a joint and several debt, but this offer was not accepted. The solicitor for Mr. Beach replied by letter, dated Hereford, June 21st, thus: — "Sir, Mr. Beach of this city has brought me your letter, and has instructed me to inform you that it is his intention to pay off the 300*l.* due to your client, on the joint note of himself and Mr. Stubbs. I shall be glad if you will let me know the amount due for interest, and Mr. Beach will be prepared to remit the money in the course of a post or two. I presume you have the notes." This seems to me to contain nothing more than a statement by the solicitor of the intention of his client to pay; and the question is, whether this is any acceptance of a new contract. I do not think it amounts to that. These two letters, then, do not make out a contract. The first contains an offer, and the second does not accept it; the second states an intention to pay, and admits a joint liability, which of course might be enforced. Another and subsequent letter has been read by counsel, which, as far as I gathered from its contents, seemed quite to confirm this view of the case, and to show that the parties did not consider that any new contract had been made. I therefore think that the estate of Mr. Beach is not chargeable.

KNIGHT BRUCE, L. J. I consider that the answer of Mr. Beach's attorney did not have the effect of varying, adding to, or extending the liability which that gentleman was originally under, and I agree

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with the conclusion at which the learned judge, who has assisted us, has arrived.

LORD CRANWORTH, L. J. I concur in every respect with the opinions which have been expressed, and the appeal must be allowed.

Cox v. DOLMAN.¹

December 18, 1852.

Statute of Limitations — 3 & 4 Will. 4, c. 27 — Arrears of Annuity secured by a Trust Term.

A testator, by his will, gave to the plaintiff certain annuities, and devised his real estates to trustees upon trust for securing the same. Some of the annuities had fallen into arrear for eighteen years and upwards:—

Held, that the term being a subsisting term, the plaintiff was entitled to recover the entire arrears.

ROBERT KILBY COX, by his will, dated the 17th of May, 1820, devised and bequeathed all and every his freehold, copyhold, and leasehold estates unto J. W. Weston and J. Wright, their heirs, executors, administrators, and assigns, to the intent that his son, R. K. Cox, and his daughters, Alicia M. Cox and the plaintiff Mary Ann Cox, and their respective assigns, might receive out of the estates, one clear yearly rent charge of 200*l.* each, during their joint lives; and that, upon the decease of any one of them, the two survivors of them and their respective assigns might receive thereout one clear yearly rent charge of 300*l.* each, during their joint lives; and, after the decease of either of them, then that the ultimate survivor of them, and his or her assigns, might receive thereout one clear yearly rent charge of 400*l.* during his or her life; the said several yearly rent charges to be payable to the testator's son and daughters respectively, at the times therein mentioned; with powers of distress and entry for enforcing the due payment thereof, as were usual, &c.; and subject thereto to the use of J. W. Weston and James Cugnoni, their executors, administrators, and assigns, for the term of ninety-nine years, to be computed from the testator's decease, upon trusts for better securing the due payment of the rent charges respectively; and subject to the term of ninety-nine years, to uses in strict settlement in favor of the testator's son, Samuel Cox, and his issue.

The testator, by a codicil to his will, dated the 23d of October, 1827, appointed certain other persons to be trustees in the place of J. W. Weston and J. Cugnoni, then deceased, and devised and be-

¹ 22 Law J. Rep. (N. S.) Chanc. 427; 17 Jur. 97.

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queathed to each of his daughters, Alicia M. Cox and Mary Ann Cox, and their respective assigns, for and during their respective lives, one further annual sum or yearly rent charge of 100*l.* sterling, to be charged upon all his freehold, copyhold, and leasehold estates, and to be raised by the trustees of the term of ninety-nine years, with the like powers of compelling payment of the same as were in his will expressed with respect to the rent charges of 200*l.*; and after the decease of either of them, the testator thereby gave to the survivor of them, and her heirs, for her life, the additional annuity of 100*l.*, with the same powers, &c. And in the event of the death of both his sons, Samuel Cox and R. K. Cox, without leaving issue male, the testator did, from and after the happening of such event, devise and bequeathe unto his said daughters and their assigns, for their respective lives, one further annual sum or yearly rent charge of 100*l.* each, to be issuing out of and charged and raisable in like manner and with the like powers, &c.; and after the decease of either of them, the testator gave to the survivor of them and her assigns, during her life, such last mentioned additional annuity, of 100*l.* lastly given to such one of his daughters as should first depart this life, with the like powers, &c. And the testator appointed Alicia M. Cox, Samuel Cox, and R. K. Cox his executrix and executors.

The testator died on the 1st of February, 1829, and his will and codicil were duly proved by Alicia M. Cox and Samuel Cox alone. R. K. Cox, the son, died in February, 1833, without ever having had issue. Alicia M. Cox died in September, 1838, without having been married. Samuel Cox, the son, died in April, 1851, having by his will, made in 1849, after reciting that he, Samuel Cox, the son, was, as heir at law of his father, and in the events which had happened, entitled in fee simple to the estates devised and bequeathed by the will of his father, expectant on the decease of Richard S. Cox, his cousin, without issue male of his body, devised and bequeathed all the same estates to the defendants, Dolman and Withers, and appointed them his executors.

The defendant Richard J. Cox, was the third and only surviving son of Dr. Samuel Cox, and was born in the lifetime of the testator, R. K. Cox, and was, after the decease of Samuel Cox, the son, under the limitations of the will of R. K. Cox, entitled as tenant for life of the estates devised and bequeathed by his will, and entered into possession of the same accordingly.

Upon the death of the testator, it appeared that none of the additional rent charges to which the plaintiff became entitled under the will after the death of R. K. Cox the son, in 1833, were ever paid. From the death of R. K. Cox the son, in 1833, to the death of Alicia M. Cox, in 1838, there was paid to the plaintiff an annuity of 300*l.* only, and from 1838 to 1850, there was paid to the plaintiff an annuity of 400*l.* only. In July, 1852, the plaintiff, Mary Ann Cox, filed her bill against Dolman and Withers, the executors and devisees in trust of Samuel Cox, the son of R. J. Cox, the tenant for life, the trustees of the term of ninety-nine years, and other parties, claiming to be entitled to recover against the estate of Samuel Cox the son, and the

Cox v. Dolman.

estates devised by the will of R. K. Cox the testator, the whole of the unsatisfied arrears of the said annuities.

The cause came on for hearing, before the Master of the Rolls, on the 4th of December, 1852, when His Honor, feeling himself embarrassed by the apparently conflicting decisions in *Young v. Lord Waterpark*, 13 Sim. 199; s. c. on appeal, 15 Law J. Rep. (n. s.) Chanc. 63, and *Hunter v. Nockholds*, 1 Hall & Tw. 644; s. c. 1 Mac. & Gor. 640, directed that an application should be made to the Lord Chancellor to hear the cause.

The cause came on to be heard, before the Lord Chancellor and the Lords Justices.

Roundell Palmer and *J. A. Cooke*, for the plaintiff. The plaintiff is entitled to recover the whole arrears under the 25th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, as the lands were devised upon an express trust to pay the annuities. *Young v. Lord Waterpark*. The Master of the Rolls felt himself embarrassed by the decision in the case before Lord Cottenham, of *Hunter v. Nockholds*; but in that case, the existence of a trust term to secure the annuity seems to have been entirely overlooked.

[The LORD CHANCELLOR. I never considered that *Hunter v. Nockholds* involved this point. It is admitted in this case, that the trustees could immediately bring an ejectment.]

Campbell and *Bagshawe, Jun.*, for the executors of the deceased tenant for life, submitted, that only six years could be recovered. The 24th section provided that time should be a bar to equitable rights, and the 25th section operated by way of exception out of the 24th, and the 25th section was meant to apply only to cases between *cestuis que trust* and trustees in possession. If the trustees took possession, they could only raise six years' arrears. In *Young v. Lord Waterpark*, there had been part payment of the portions within the twenty years; and, therefore, the demurrer was overruled.

Cory, for the defendant Wright.

C. P. Cooper and *Witham*, for other parties.

The LORD CHANCELLOR. The argument for the defendants is one which it is not possible to support. The point has been clearly settled by the case of *Young v. Lord Waterpark*, and there is no distinction between that case and the present. Where the legal estate remains undisturbed, and the person who has that estate, as trustee, may recover the estate, and acquire possession, so long the right of the person who is *cestui que trust* is not barred; because when the trustee recovers the property he must execute the trust, and the right of the *cestui que trust* is to have the full benefit of the trust. Sections 40 and 42, the one relating to principal and the other to interest, have much the same object; and the only question is, whether they constitute an independent bar, so as to prevent the trustees from raising

Heward v. Wheatley.

the arrears. It is admitted that this is a subsisting term upon which the trustees may recover to-morrow; and, therefore, I can see no ground for the argument.

But another circumstance of great weight exists in this case, namely, that three fourths of these annuities have all along been raised; the trust, therefore, has been in a state of execution, though not fully executed; and that it was not executed by the trustees to the full extent, arose from the common mistake of the parties. The person in possession of the estate knew that the term was in daily operation, and the money being raised from time to time. I rest the case, however, upon the first ground. It is impossible, I think, to find fault with the decision in *Young v. Lord Waterpark*, and the report is only defective in not stating that there was a subsisting term upon which the trustee could have recovered. It is now admitted, that in that case there was a subsisting term. There must be a declaration, therefore, that the whole of the arrears are to be raised.

The Lords Justices concurred.

HEWARD v. WHEATLEY.¹

March 3, 1853.

Company — Deceased Shareholder — Executors — Calls.

In a suit for the administration of the estate of a deceased shareholder in a joint-stock banking company, the registered public officer presented a petition praying leave to prove as a creditor for the amount of a call made since the death of the shareholder in respect of the shares:—

Held, overruling the decision of the Court below, that the deceased shareholder, having covenanted to pay all calls, and the shares having vested in his executors, as part of his estate, they by law became entitled to the benefit of the deed, and were liable for the calls, there being nothing in the deed of settlement of the company overruling the rule of law.

This was a suit for the administration of the estate of a deceased shareholder of the company hereinafter named, the public officer of which had presented a petition to prove as a creditor. The late Master Dowdeswell had admitted the petitioner to claim; but after the death of Mr. Dowdeswell, the reference was continued before Master Humphry. This was now a petition praying that it might be referred back to Master Humphry, to review his report disallowing the claim of the Northumberland and Durham District Banking Company, to stand as creditors upon the estate of Joseph Elder, for the sum of 1,250*l.* and interest.

¹ 22 Law J. Rep. (N. S.) Chanc. 485; 17 Jur. 366, on appeal, 403.

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Joseph Elder, the testator, became the purchaser of 150 shares in the Northumberland and Durham District Banking Company, in February, 1842, from Charles Bragg. Five of these shares were transferred to Joseph Elder, by an indenture dated the 5th of February, 1842, in the form adopted under the provisions of the deed of settlement. In this deed, Joseph Elder covenanted, for himself and his executors and administrators, with the trustees of the company, that he would, from time to time, and at all times thereafter, in respect of the shares thereby assigned, pay all instalments and sums of money then due or to become due thereon. The remaining 145 shares were transferred by a notice (of the same date as the indenture) given by Bragg, the consent to the transfer being signed by two of the directors in the usual manner. Joseph Elder made a further purchase of 100 shares from Richard Pengilly, on the 24th of February, 1846, and the transfer of these was also effected in accordance with the provisions of the deed of settlement. In respect of all these 250 shares he was duly registered, and continued to receive the dividends up to his death, on the 8th of December, 1847. On the 1st of September, 1848, a call of 5*s.* per share was made by the company, and notice given to the executors of Joseph Elder. The call remained unpaid, and the executors had taken no steps whatever towards becoming members of the company in respect of their testator's shares, nor had they received the dividends which remained in suspense. A bill had been filed by the residuary legatee for the administration of Elder's estate, and under the decree referring it to the Master to take the accounts, the company presented their claim as creditors for 1,250*l.*, with interest, the amount of the call. Master Dowdeswell had allowed their claim, but as he retired before signing the report, the matter was again gone into before Master Humphry, his successor, and the claim of the company was disallowed. Some of the parties, being dissatisfied with the decision, presented this petition to Vice-Chancellor Stuart,¹ who dismissed it, with costs, being of opinion that as neither

¹ The principal part of the Vice-Chancellor's judgment was as follows:—"I find that the executors had the power of becoming partners, and were liable to these calls by one of those express stipulations contained in that deed executed by Mr. Elder. It is stipulated very carefully by the 27th clause of this deed that the executors might, if they chose, continue for the benefit of the estate of this testator the rights and benefits of these shares, subject to the liability of paying the calls. It is also stipulated that, instead of being bound in any event to put themselves in that situation, which would have made them liable to the calls, they may put themselves in an entirely different situation, and sell the shares. An option was given by the 27th clause to the executors to sell the shares, which would have put an end to the claim on this petition, or to make themselves proprietors of the shares, which would have made them liable to the demand on this petition. Having done neither the one nor the other, this petition seeks to make them just as liable for the calls subsequent to the death of Mr. Elder as they would have been, if they had exercised the option given to them by the 27th clause. There can be no doubt, if they had exercised the option and had become members of the company and had taken shares, they would have been liable to have paid the calls. Now, the 27th clause provides, if the option of becoming shareholders is to be exercised, how it is to be carried into effect. The 29th clause contains a stipulation which contemplates the case of their not choosing to adopt the shares, for it

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the arrears. It is admitted that this is a subsisting term upon which the trustees may recover to-morrow; and, therefore, I can see no ground for the argument.

But another circumstance of great weight exists in this case, namely, that three fourths of these annuities have all along been raised; the trust, therefore, has been in a state of execution, though not fully executed; and that it was not executed by the trustees to the full extent, arose from the common mistake of the parties. The person in possession of the estate knew that the term was in daily operation, and the money being raised from time to time. I rest the case, however, upon the first ground. It is impossible, I think, to find fault with the decision in *Young v. Lord Waterpark*, and the report is only defective in not stating that there was a subsisting term upon which the trustee could have recovered. It is now admitted, that in that case there was a subsisting term. There must be a declaration, therefore, that the whole of the arrears are to be raised.

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In a suit for the administration of the estate of a deceased shareholder in a joint-stock banking company, the registered public officer presented a petition praying leave to prove as a creditor for the amount of a call made since the death of the shareholder in respect of the shares:—

Held, overruling the decision of the Court below, that the deceased shareholder, having covenanted to pay all calls, and the shares having vested in his executors, as part of his estate, they by law became entitled to the benefit of the deed, and were liable for the calls, there being nothing in the deed of settlement of the company overruling the rule of law.

THIS was a suit for the administration of the estate of a deceased shareholder of the company hereinafter named, the public officer of which had presented a petition to prove as a creditor. The late Master Dowdeswell had admitted the petitioner to claim; but after the death of Mr. Dowdeswell, the reference was continued before Master Humphry. This was now a petition praying that it might be referred back to Master Humphry, to review his report disallowing the claim of the Northumberland and Durham District Banking Company, to stand as creditors upon the estate of Joseph Elder, for the sum of 1,250*l.* and interest.

¹ 22 Law J. Rep. (N. S.) Chanc. 485; 17 Jur. 366, on appeal, 403.

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Joseph Elder, the testator, became the purchaser of 150 shares in the Northumberland and Durham District Banking Company, in February, 1842, from Charles Bragg. Five of these shares were transferred to Joseph Elder, by an indenture dated the 5th of February, 1842, in the form adopted under the provisions of the deed of settlement. In this deed, Joseph Elder covenanted, for himself and his executors and administrators, with the trustees of the company, that he would, from time to time, and at all times thereafter, in respect of the shares thereby assigned, pay all instalments and sums of money then due or to become due thereon. The remaining 145 shares were transferred by a notice (of the same date as the indenture) given by Bragg, the consent to the transfer being signed by two of the directors in the usual manner. Joseph Elder made a further purchase of 100 shares from Richard Pengilly, on the 24th of February, 1846, and the transfer of these was also effected in accordance with the provisions of the deed of settlement. In respect of all these 250 shares he was duly registered, and continued to receive the dividends up to his death, on the 8th of December, 1847. On the 1st of September, 1848, a call of 5% per share was made by the company, and notice given to the executors of Joseph Elder. The call remained unpaid, and the executors had taken no steps whatever towards becoming members of the company in respect of their testator's shares, nor had they received the dividends which remained in suspense. A bill had been filed by the residuary legatee for the administration of Elder's estate, and under the decree referring it to the Master to take the accounts, the company presented their claim as creditors for 1,250*l.*, with interest, the amount of the call. Master Dowdeswell had allowed their claim, but as he retired before signing the report, the matter was again gone into before Master Humphry, his successor, and the claim of the company was disallowed. Some of the parties, being dissatisfied with the decision, presented this petition to Vice-Chancellor Stuart,¹ who dismissed it, with costs, being of opinion that as neither

¹ The principal part of the Vice-Chancellor's judgment was as follows:—"I find that the executors had the power of becoming partners, and were liable to these calls by one of those express stipulations contained in that deed executed by Mr. Elder. It is stipulated very carefully by the 27th clause of this deed that the executors might, if they chose, continue for the benefit of the estate of this testator the rights and benefits of these shares, subject to the liability of paying the calls. It is also stipulated that, instead of being bound in any event to put themselves in that situation, which would have made them liable to the calls, they may put themselves in an entirely different situation, and sell the shares. An option was given by the 27th clause to the executors to sell the shares, which would have put an end to the claim on this petition, or to make themselves proprietors of the shares, which would have made them liable to the demand on this petition. Having done neither the one nor the other, this petition seeks to make them just as liable for the calls subsequent to the death of Mr. Elder as they would have been, if they had exercised the option given to them by the 27th clause. There can be no doubt, if they had exercised the option and had become members of the company and had taken shares, they would have been liable to have paid the calls. Now, the 27th clause provides, if the option of becoming shareholders is to be exercised, how it is to be carried into effect. The 29th clause contains a stipulation which contemplates the case of their not choosing to adopt the shares, for it

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of the executors nor the company, had done any thing under the 28th, 29th, and 30th clauses of the deed of settlement, the company had no claim against the estate of Mr. Elder. There were, in his Honor's view, four important clauses of the deed of settlement; namely, the 27th, by which executors of deceased shareholders might sell or dispose of their testator's shares; the 28th, by which executors might become shareholders by doing certain acts; the 29th, by which no dividends should be payable to an executor until a transfer should be made in a manner pointed out; and the 30th, by which the directors might declare shares of deceased members to be forfeited if certain acts were not performed.¹

stipulates that they may receive all the dividends up to the time of their testator's death, and due in his lifetime, and that (as I read it) until they exercise the option of being shareholders under the 27th clause, no dividends are to be payable. Then the matter, as between the company and the representatives of a deceased shareholder in the situation of Mr. Elder, is made complete by the 30th clause, which provides for what without it was left incomplete, namely, what the company might have a power to do, provided the representatives of a deceased shareholder did not choose to sell his shares, or they did not choose to adopt them as shareholders, but left the matter without exercising any option at all. Then the matter was left to the option of the company, and the company were empowered, under the 30th clause, to declare the shares forfeited, which was, in truth, only enabling them to exercise one of the options putting it in their power to do what, under the 29th clause and in the events in this case, the executors had a power to do, and have not done, namely, to sell the shares. So that all parties had the power to set themselves right on the event occurring of the death of a shareholder, and upon the questions between the shareholder's estate and the company. Now, in this state of things, no option having been exercised, nothing having been done by any of the parties under any one of these three clauses, the question is, whether I am at liberty to say, as between the company and the other creditors of the testator, — not the other shareholders, but the other creditors of the testator, — that the company, who had reserved to themselves the power of asserting their rights in respect of these shares, are entitled to claim as creditors against the estate? I think they have no such right. . . . I cannot see what the company are creditors for. I am told for the calls. How can the company be creditors for the calls, when I find by an express stipulation in this deed that in the events that have happened they are entitled to retain the dividends on the shares? It is impossible, therefore, for me to hold, where they reserve to themselves the right of retaining the dividends and the right of declaring the shares forfeited, and they have not exercised the right, and the right which the executors had and might have exercised, which would have made them liable to this demand, — it is impossible for me to hold when they have not exercised that right, that there is any claim against the assets of the testator in this case. And I must hold, therefore, on the best construction I can give to the instrument, to the deed of covenant, and the facts of this case, that, on the death of Mr. Elder, that state of things arose which gave their respective remedies to the parties, and none of the parties having exercised the option allowed to them, I cannot, from the non-exercise of that option, infer that the company ought to be considered as creditors. I must, therefore, dismiss this petition; confirming, as I do, the view taken by the Master, whose report is before me. I am told, that Master Dowdeswell had decided the other way; but although Master Dowdeswell seems to have allowed the claim, I cannot say I entertain any doubt on the question sufficiently strong to induce me to hold that Master Humphry is wrong; and I must consider that Master Humphry had more fully before him than I had, the authority of Master Dowdeswell, which we all know is entitled to very great weight in this court."

¹ The material clauses of the deed of settlement of the company, relied upon by the Vice-Chancellor, were as follows: —

Clause 27. That the husband of any female shareholder, or the executor, adminis-

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From this decision of the Vice-Chancellor, the public officer (Mr. Ogden) appealed.

Malins and Toller, for the appellant.

Lee and Hislop Clarke, for the plaintiff.

Bacon and W. D. Lewis, for the executors.

The arguments were of great length; but as they are very distinctly stated and referred to in their lordships' judgment, and as this report, with the passages from the Vice-Chancellor's judgment and the

trator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent debtor, possessed of shares, shall not be a member of the company in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively; but such assignee of a bankrupt or insolvent debtor shall sell and dispose of such shares in manner and subject to the provisions hereinbefore expressed and contained with respect to the sale and transfer of shares; and any such husband, executor, administrator, or legatee as aforesaid, shall be at liberty either to sell and dispose of the shares so vested in him in like manner, or at his option to become a member of the company in respect of such shares, on complying with the provisions of these presents as next hereinafter in that behalf expressed.

Clause 28. That the husband of any female shareholder, or the executor, administrator, or legatee of a deceased shareholder who shall be desirous of becoming a member of the company in respect of the shares vested in him in any of such capacities respectively, shall give seven days' notice, &c.; whereupon and upon otherwise complying with the provisions of these presents, or any supplementary deed or deed of accession thereto, he shall be admitted and become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall stand and be personally charged with the duties and liabilities incident to the ownership of the same.

Clause 29. That the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, who shall not, under the provision lastly hereinbefore contained, elect to become a member of the company in respect of the shares vested in him in any such capacity, and also the assignee of every bankrupt or insolvent debtor possessing shares, shall be entitled to receive any dividend which shall have become due on the shares so vested in him in any such capacity as aforesaid before his title to the same shares accrued, but no dividend which shall become due on the same shares after his title shall have accrued shall be payable to or demandable by him, but shall, till some person shall have become a member of the company in respect of the same shares, remain in suspense, and shall not be paid till the transfer thereof shall be completed and the new holder thereof shall claim the same.

Clause 30. That in case any person in whom any shares shall by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition become vested, and who shall not have executed these presents or some supplementary deed or deed of accession thereto, shall for six calendar months after the notice in writing for that purpose, neglect or refuse to execute the same deed respectively, it shall be lawful for the board of directors to declare the shares so vested in such person so neglecting or refusing, and all instalments paid thereon, and all benefit, and advantage, dividends, and profits whatsoever in respect thereof or incident thereto, to be forfeited to the company for the benefit and use of the continuing shareholders therein, and the same shall be forfeited accordingly.

The other clauses of the deed, and which are referred to in the judgment of the Lords Justices, were these:—

Clause 12. That no benefit of survivorship shall arise or take place amongst the

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clauses of the deed cover a considerable space, it has been judged better to omit them.

TURNER, L. J. This was a petition presented by the registered public officer of the Northumberland and Durham District Banking Company, praying the reversal of the Master's report, by which he found that the petitioner was not a creditor of the estate of Mr. Joseph Elder. It is to be observed that this does not come before the court in its regular course, and I observe it because it is very inconvenient to have matters of this description brought before the court by petition instead of the ordinary form in which these matters have been hitherto discussed.

The first question for consideration is, how the claim, which the petitioner asserts against the estate of Joseph Elder, has arisen? It appears that the banking company was established by a deed of settlement of the 1st of July, 1836, to some of the provisions of which

shareholders in the said copartnership bank, and all the property of the company as between the shareholders thereof, and as between their respective real and personal representatives, shall always be considered and deemed to be personal estate, so that each and every of the shareholders shall, as between and amongst themselves, have a distinct and separate right to his shares in the capital or joint stock of the company, and the same shall be vested in him to and for all intents and purposes, and subject to his disposition by deed or will, or in case of intestacy, to be transmissible to his personal representatives as part of his personal estate.

Clause 17. That in addition to the payments aforesaid, amounting to 5*l.* per share, required to be made by each shareholder under the provisions lastly hereintofore contained, the directors of the said bank for the time being shall have full power, from time to time, or at any time, to call for and require the payment, by each and every shareholder, of the further sum of 5*l.* in respect of every share held by him in the said copartnership bank, either in one sum, or by such instalments; provided always that notice in writing of every such call, expressing the time and place when and where every payment is required to be made, and stating the substance of the provision next hereinafter contained, so far as the same relates to the forfeitures of shares for the non-payment of calls, be given to every shareholder two calendar months at the least before the time appointed for payment of any such call, and the directors shall have full power in the name or names of any of the registered public officer or officers of the company to sue for and recover the amount of every or any such call and interest thereon from every person refusing or neglecting to pay the same as aforesaid, and also if they shall think proper to enforce the forfeiture of the shares held by every person so refusing or neglecting in pursuance of the two provisions next hereinafter contained.

Clause 23. That the board of directors of the said copartnership bank shall prescribe the form of the transfer of shares therein, and have power from time to time to make such regulations respecting the preparation, custody, and registration of the instrument to be made and executed upon the sale or transfer of shares as shall appear to them necessary and advisable for the security of the company, and the due assignment of the said shares, and all sales and transfers of any shares not made conformably to the provisions of the deed of settlement, and according to the regulations of the board of directors, shall be invalid at law and equity.

Clause 32. That every person in whom any shares shall vest by transfer or otherwise, and who previously to such vesting shall have executed the deed of settlement, and who shall be a member of the company to all purposes in respect of any other shares, shall, as to all shares so vesting in him as aforesaid, be considered as a member from the date of the transfer to him, or from the time of leaving his title to shares in the banking house of the company.

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it will be necessary hereafter to refer. On the 5th of February, 1842, the testator, Mr. Elder, purchased 150 shares in the company, of which five shares were transferred to him by a deed stated in the petition to have been made between the owner of the shares, Mr. Bragg, of the first part, the testator of the second part, and Mr. Backhouse and Mr. Mounsey, the trustees of the banking company, of the third part, and by which deed Mr. Bragg, in consideration of 41*l.* 5*s.* paid by Elder, assigned five shares in the capital stock of the company to Elder, "subject to the covenants, provisos, declarations and agreements contained in the said or any future or supplemental subsisting deed of settlement of the said company." And Elder, by that deed, covenanted with Backhouse and Mounsey, the trustees of the company, that he, Elder, would from time to time, and at all times thereafter, in respect of the said shares thereby assigned, pay all instalments and sums of money then due or thereafter to become due thereon, and also perform, fulfil and keep all and every the covenants, stipulations, provisions and regulations for the time being, affecting or intended to affect holders of shares in the said company. That operated as a transfer of five shares in the company, and was an undoubted covenant by Mr. Elder to observe the provisions of the deed so far as respects those five shares. The remaining 145 shares of the 150 purchased by Elder were not transferred to him by deed; but there was a notice given which was, I presume, according to the usual course of the company's proceedings. The vendor, Bragg, gave notice that he had agreed to sell to Elder the 150 shares, of which the five which were transferred were part, at so much per share, and requested that they might be transferred to the name of Mr. Elder, who signed his consent or contract to become the purchaser and proprietor of these shares, subject to the rules and regulations of the banking company then existing, and I think that notice was assented to by there being a memorandum signed at the foot by two of the directors of the banking company, Mr. Elder admitting that he was a shareholder in respect of these shares. A similar transaction afterwards took place in February, 1846, by which he purchased of another party 100 shares, and he was entered on the register as holder of all these shares. He received the dividends upon them up to the time of his death, which occurred on the 8th of December, 1847. A call of 5*l.* on these shares was made in September, 1848, and the question now arises, whether his estate is liable for that call?

It is first said for the respondents, that Elder never did, in fact, become a shareholder in this concern. That point was raised by Mr. Clarke, in the argument, and was rested upon the 23d and 32d provisions of the deed [which his Lordship here read]. Now, the regulations of this company, so far as they appear before us, are not that the party should be required to execute the deed for the purpose of the transfer of the shares; but part of the 32d clause is, "And every purchaser and transferee of shares shall, in respect thereof, when required by the directors, execute these presents or some supplementary deed." It is not, therefore, as it seems to me, till he is required, that, according to the deed, he is to execute the deed of transfer. From all

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that can be collected from the present case (and nothing has been said to the contrary), the present course is one that has been adopted in all other cases of transfers of shares. The transfer is taken upon a limited number of shares, and he becomes registered owner of the other shares, which are not the subject of a deed of transfer. Now, therefore, the provisions of the deed are these: — that there shall be a transfer of a certain number of shares by deed, but beyond that the parties are to become the holders by registration of their names, and, therefore, they cannot say that they are not the owners, because they are not so by deed.

Now, Mr. Elder being thus the owner, it is said that his executors are not liable in respect to the call which has been made upon the shares since the death of Mr. Elder; but I take it to be a matter of perfectly clear and good law, that whether the words "executors" or "administrators" be contained in a covenant entered into — a question to which Mr. Lewis has rightly directed our notice as occurring in *Gouthwaite's case*, 20 Law J. Rep. (N. S.) Chanc. 188; s. c. 2 Eng. Rep. 57 — every executor must be liable upon the contract which has been entered into by his testator; and the question is, whether upon the contract entered into under this deed, this testator has or has not covenanted for the payment of the 5*l.* per share called after his death? Now, the liability in this respect depends upon the 17th clause. It appears that on the company being formed there was 2*l.* 10*s.* to be paid in the first instance, on the deed being prepared, and 2*l.* 10*s.* more within a limited time, making 5*l.* per share; and as to the remaining 5*l.* the deed contained this 17th provision — [which his Lordship read]. Something has been said in the course of the argument of the right of the directors of this company to enforce the forfeiture of the shares, and it is material, therefore, to observe in this clause that the power given under it is to sue for the calls, and also, if they shall think fit, and not otherwise, to enforce the forfeiture of the shares. They have a right, therefore, to call for money due on shares, and, if they think fit, they may enforce payment by a forfeit of the shares, but it is not imperative upon them to do so. It is said, in the first instance, that there is not a liability created in these executors, for the reason, that at the time of the call the power given by the deed is to call for and require payment by each and every "shareholder;" and that notice is to be given to each shareholder; and it is said that Mr. Elder was not a shareholder at the time when this call was made. But the question is as to the meaning of the term "shareholder" in this deed. According to the definition of the term in this deed, which contains an interpretation clause, it is, "wherever the expressions 'shareholders' and 'members' are used, they shall respectively be held to mean 'proprietors' or 'owners' of shares, or of an 'interest' in the capital and joint stock, for the time being, of the said copartnership bank." When, therefore, we see a covenant like this entered into by this gentleman, that a public officer shall be at liberty to sue for or recover the amount from any person refusing or neglecting to pay, it is impossible to say that this gentleman and his executors are not liable.

It is said that this clause is qualified by the 27th and other provi-

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sions in the deed. Great reliance is placed upon the 27th clause as to the power to sell shares. Now, it is quite true, that the deed does contain provisions that the executors shall not be members of the company, except under certain conditions; but we must examine the other provisions and see what the deed means — when you examine the provisions for that purpose, you see that he is contemplated, throughout the deed, as being the holder of the shares in the company — though still by the deed placed in the position of not having all the rights which are incident and belong to an owner of the shares. The right to receive the dividend is restricted by the deed, but the vesting in him is in terms spoken of as a consequence of the death of the testator. And, when one considers it, I rather take it that that must be the necessary effect of the deed. These shares were part of the personal estate of the testator at the time of his death. By law they must vest in the executor, unless the contract be such as that the interest of the testator and that of his estate is destroyed by his death, or unless the deed has provided that the legal consequences shall not follow. The law gives them to the executor. The deed might overrule the law, by saying that there should be no interest passing to the executor. But now is the effect of this deed such as that the interest shall cease? It is perfectly clear that it is not, because it contains the 12th provision, that there shall be no right of survivorship. It is clear, therefore, that this deed did not overrule the general law that the shares should vest in the executor, but, on the contrary, meant to provide that the shares should vest separately in the executors or administrators of each testator or intestate who had a share in the concern, and if there could have been an overruling of the law in this case, I am very clearly of opinion that there has not been such an overruling here, because the deed speaks of the share being vested in the executors. It is true that the rights of the executors are suspended, but they are not destroyed, and according to the provisions of this deed they will be entitled to the benefits of it.

Then, again, reference has been made to the cases on the subject of contributories; and it is said, that these cases do not apply to the present case. No doubt there is a distinction between cases under the Winding-up Acts and the present, because in those cases of contributories the liability may depend not merely upon the deed, but upon extrinsic circumstances also. In the present case the liability depends upon the deed itself. But, then, let us see what the cases are. In many of them, particularly in *Straffon's Executors' case*, 1 De G. M. & G. 589; s. c. 10 Eng. Rep. 275, there was a liability on the deed itself, for the executors had done no act whatever to make themselves liable *ultra* the deed; but Lord St. Leonards without difficulty held that they were to be considered as shareholders in the concern. The substance of these decisions is, that upon the provisions of the deed of settlement, and by it, the executors were substituted shareholders in the concern, and in that sense contributories. With reference to the cases of *Ness v. Armstrong*, 4 Exch. Rep. 21, and *Ness v. Angus*, 3 Exch. Rep. 805, Lord St. Leonards, in delivering his judgment in *Straffon's Executors' case*, says, as follows: —

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"Those cases, however, are also distinguishable; they depend upon a particular act of parliament, which, though referring to equitable as well as legal liabilities, does not furnish any particular remedy for equitable liabilities; and, therefore, a man cannot be proceeded against by a *scire facias* under the particular provisions of that act, unless it can be shown that he is legally liable as a member." That is a distinction laid down by him upon that point, and I think it is perfectly well founded. There is an original liability created in the testator, if I rightly construe the deed, and I see nothing to discharge that liability.

We have been very much pressed, upon the part of the respondents, that we should suspend our decisions upon the case until we should have the assistance of a common-law judge upon the subject. No doubt this power given us by the act of parliament to call in such assistance is of great value — it is impossible to overestimate the value of that power — but, at the same time, it is a duty, I think, of this court, which we owe to perform, not to call in the aid of common-law judges, unless we have reasonable doubt upon the point raised for our consideration. I cannot say that in this case I have any doubt, and my learned brother entirely concurs with me in that opinion. The order must be reversed. The Master must review his report on this liability.

Knight Bruce, L. J., after expressing his concurrence, said, that with a declaration that "the petitioner has a claim on the estate of the testator in respect of the call in the petition mentioned," the matter should go back to the Master.

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January 20, 21, 1853.

Production of Documents — Pedigrees — Extracts from Parish Registries.

The question in the suit being whether, upon the construction of certain words in a will, an estate tail or an estate in fee was limited, it became necessary for the plaintiff to prove his pedigree. The plaintiff moved for production of documents in the defendant's possession, consisting of deeds showing the precise nature and extent of the property; copies of pedigrees furnished to counsel to defend an action of ejectment brought against the defendant by the plaintiff; extracts from parish registries of births, deaths, and marriages; and a pedigree from the Heralds' College, procured by the defendant for his defence to the action:—

Held, that the extracts from parish registries and the pedigree from the Heralds' College must be produced, but none of the other documents required.

¹ 22 Law J. Rep. (N. S.) Chanc. 447.

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THIS was a motion for production of documents, under the following circumstances:—

It appeared that Sir Thomas Samwell, of Upton, in Northamptonshire, made his will in the year 1778, leaving very large estates to various members of his family as tenants in tail, with an ultimate remainder to his own right heirs. All the estates tail failed, the last tenant in tail having died in 1843. The right heirs of Sir Thomas Samwell were his three nieces, Mrs. Drought, Frances Langham, and Phillis Langham. The last two, who were sisters, made mutual wills, dated in 1827, by which, after making various limitations of the estates to particular persons, all of which limitations were eventually exhausted in 1849, gave their two thirds of the estate to trustees, in these terms: "In trust for the right heirs of my grandfather, Sir Thomas Samwell, Baronet, deceased, (father of my late uncle, Sir Thomas Samwell,) by Mary, his second wife, also deceased, who was the daughter of Sir Gilbert Clarke, knight, for ever."

This suit was instituted for the purpose of obtaining the opinion of the court upon the construction of these words. It was admitted that the right heir of Sir Thomas Samwell by Mary Clarke, his second wife, at the death of the two ladies whose wills were in dispute, was Thomas Watson Samwell. The plaintiff alleged that the words of the will gave an estate tail descendible to the issue of Sir Thomas Samwell by his wife Mary Clarke, and that the plaintiff's wife, Charlotte Wright, was such issue, and that he was now entitled to the estate. The defendant alleged that the limitation in the will of the two ladies gave an estate in fee to the right heir of Sir Thomas Samwell by his second wife, and he claimed under the widow of Thomas Watson Samwell, to whom all his estates were devised. An action of ejectment had been brought against the defendant by the plaintiff to recover possession of the estates in question; but, in consequence of the legal estate being outstanding in a mortgagee, the plaintiff had been unable to prosecute the action, and was obliged to have recourse to this court. The plaintiff, in order to make out his title, had to establish his wife's pedigree, and now required the production of the title-deeds in the defendant's possession, and also of certain pedigrees which had been prepared for the defendant's counsel upon the action of ejectment, and various other documents, comprising about fifty extracts of births, marriages, and deaths, and a pedigree from the Heralds' Office procured by the defendant for his defence to the action.

Malins and *Smythe* appeared in support of the motion for production.

Campbell and *Bagshawe*, contra, objected to the production, on the ground that the plaintiff had not alleged his title with sufficient certainty; that he was not entitled to inspect the documents until he had shown himself to be entitled under the wills; that the documents in themselves were not such as ought to be produced. The first were deeds which could not prove the plaintiff's title, and the only

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use that could be made of them was, to show the exact nature and extent of the property. There were also copies of registries, but these were such as the plaintiff might himself procure by paying for them, and there was no reason why the plaintiff should be allowed to inspect the copies which the defendant had himself procured from public sources and paid for. The pedigree obtained from the Heralds' Office was subject to the same objection, and the plaintiff might obtain a similar pedigree by paying for it.

KINDERSLEY, V. C. The documents now asked for are, first of all, the deeds relating to the estate; and the ground on which it is contended that the plaintiff has a right to their inspection is, that they would tend to show the precise particulars of the parcels comprising the property sought to be recovered. If that object were at all necessary for, or could assist the plaintiff in making out his case, he would have a right to these documents, but I do not see that they would assist him in any manner. It does not matter how many acres there are, nor what are the names of the different pieces; none of these matters can assist the plaintiff in making out his case; I think, therefore, that he has no right to their inspection.

The next set of documents consists of certain pedigrees made out for the use of the defendant's counsel. These pedigrees were only the supposed pedigrees of the defendant, and were framed for the purpose of instructing his counsel. They could not be used as an admission of the fact that they constituted the defendant's pedigree, but they were merely to show counsel what was to be met. These pedigrees, I think, the plaintiff is not entitled to.

Then come the extracts from parish registries of births, deaths, and marriages, which were procured by the defendant for his defence to the action of ejectment, which arose under these circumstances. The plaintiff in the present suit was desirous of trying the question whether, on the construction of the two wills of these ladies, the estate created in Sir Thomas Samwell was an estate in fee or in tail. If it was an estate tail, then the plaintiff contended that he would be entitled, but if it was an estate in fee, then he would not be entitled, but the defendant would. Upon the understanding that that was a purely legal question, an action of ejectment was brought by the plaintiff, but it turned out that by reason of the legal estate being outstanding in mortgagees, the question could not be tried upon an action. For the defence to that action, the defendant procured extracts from parish registries to show what was the pedigree of the defendant himself, which, to a certain extent, is the same as that of the plaintiff's wife. The action of ejectment is at an end. The effect of these documents, no doubt, is to show the pedigree of the plaintiff's wife, and the plaintiff asks to have them produced. Why should he not? Why is the circumstance that they were procured for the defence to an action, any reason for their non-production? Even if they had been procured for the purposes of this very suit, production might have been compelled. Suppose there were any allegation that the documents were privileged, that would be a different thing; but, on the contrary, the

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defendant says, they may be obtained by the plaintiff from the same source, consequently they can by no means be protected as confidential documents.

This objection is like that which was raised in *Storey v. Lord George Lennox*, 1 Myl. & Cr. 525. In that case, a person who had effected an insurance upon another's life, commenced an action against the trustees of the insurance company, for the recovery of the amount insured. The trustees filed a bill of discovery against him, in aid of their defence to the action, charging that the declaration upon the basis of which the insurance had been effected was untrue, and that the defendant had in his possession various documents, by which the truth of the matters alleged in the bill would appear, and requiring him to produce them. The defendant by his answer stated that he had in his possession certain documents contained in the schedule, but from a certain period after the death of the person whose life was insured, he considered it possible that the insurance company had it in contemplation to dispute their liability; and, therefore, from that period he contemplated the necessity of bringing the action: and he added, that the documents contained information furnished to him as to evidence which could be procured or given on his behalf against the company; and that the producing the same might disclose the names of witnesses intended to be examined, and evidence intended to be given, on his behalf, in the action and in that suit; and, therefore, he objected to produce such documents. The defendant was in this case ordered to produce the documents.

These are documents consisting of extracts from parish registries, showing matters which the plaintiff might be able to get himself, without doubt; but if the defendant has got that which will assist the plaintiff's case, and they are not protected on the ground of confidential communications or otherwise, the plaintiff has a right to inspect them.

Then as to the pedigree which the defendant obtained from the Heralds' College. The only objection to production is, that it was obtained by the defendant at his own expense, and that the plaintiff should not have the benefit of inspecting what the defendant had paid for. Now, it does not appear to me that it is any reason why the plaintiff should not have inspection, if it will tend to show that the plaintiff sustains the character he says he does.

It has been urged that the plaintiff ought not to have any assistance from the court till it is decided that he is entitled to the estate which is in controversy in this suit. Now, the court will have to determine a question raised on the pleadings, which is, as to what is the construction of the two wills, about the existence of which wills there is no question of fact. The whole point raised for discussion at the hearing will be the construction to be put upon the will. The plaintiff says, on one construction, that he being descended from one individual, he will be entitled to the estate; and, on the other construction, the defendant, being descended from the same individual, will have it. How can it be contended, that before the plaintiff has

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a right to discovery, which will tend to show he is what he says he is, he must have the question determined of whether, on the construction of the wills, he is entitled to the estate? He has been defeated at law, because he has not the legal estate which is outstanding. His only difficulty of getting his case to a hearing is, that he has first to make out that he is what he represents himself to be, a descendent of A. B. On every established principle, whatever document is in the defendant's possession, which is not protected on special grounds, and which the plaintiff may use to make out his case, he has a right to inspect.

Then it is said that the plaintiff does not sufficiently allege his case in the pleadings. [His Honor then stated the effect of the allegations in the bill, and said his opinion was, that the plaintiff had set forth his case sufficiently, and continued] — For all these reasons, I think the plaintiff is not entitled to the majority of the documents, but he is entitled to the extracts from the registries and the pedigrees procured from the Heralds' College.

JAMES V. LORD WYNFORD.¹

November 17, 19, 22, 23, 24; December 1, 1852.

Will — Construction — Remoteness.

A testator devised freehold and leasehold estates to trustees, upon trust to pay the rents to A, for life, and, after her death, to pay the rents for the benefit of A's son Robert, and all and every the other son and sons of A, until he and they should attain their ages of twenty-five years; and, on his and their attaining that age, in trust for the heirs, executors and administrators of Robert, and all the other son and sons of A, as should attain twenty-five; but, in case they should all happen to die under twenty-five, then over: —

Held, that the devise to Robert, and the other sons and son of A, gave them an immediate vested interest, and was not void for remoteness.

A testator gave freehold and leasehold estates to trustees upon trust for A, for life, and directed them, after the death of A, to pay the rents, or so much thereof as should be necessary, for the maintenance of A's son Robert, and all other sons of A, until he or they should attain twenty-five; and, on his or their attaining twenty-five, upon trust for him and them for their lives, as tenants in common, and, after their decease, in trust for the eldest son of Robert and the eldest of all the sons of A, and the heirs of his and their bodies; and for want and in default of such issue, over: —

Held, that the devise and bequest of the freehold and leasehold estates took effect in favor of Robert and such other sons, and was not void for remoteness; and that there was an estate tail given to the eldest son of Robert and the eldest of the sons of A.

ROBERT TAYLOR, by his will, dated the 6th of April, 1796, devised unto W. D. Best and Thomas Best and their heirs, executors, administrators, and assigns, all his freehold and leasehold estates situated

¹ 22 Law J. Rep. (N. S.) Chanc. 459; 17 Jur. 17.

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within the parish of Crewkerne, upon trust to pay the rents to his daughter, Mary Anne Taylor, for her life, and, after her death, to hold the same, on the trusts therein mentioned, for her children; and, if she should die without leaving a child, to pay the rents to his daughter Bridget, for life. The will then proceeded as follows: "And from and after her death then in trust to receive the clear yearly rents and profits, and pay and apply the same to and for the use and benefit of my daughter Bridget's son, Robert, and all and every of her son and sons as she shall happen to leave, until he and they shall attain his and their age and ages of twenty-five years, and, on his and their attaining that age, in trust for the heirs, executors, administrators, and assigns of the said Robert, and all and every other son and sons as my said daughter Bridget shall happen to leave and to attain the age of twenty-five years, for all such terms, estates, and interests, both freehold and leasehold, as I can give therein. But, in case my said daughter Bridget shall leave no son or sons, or they shall all happen to die without attaining the age of twenty-five years, then in trust for all and every the daughter and daughters of my said daughter Bridget that shall attain the age of twenty-five years, her and their heirs, executors, administrators, and assigns; but, in case my said daughter Bridget shall leave no son or daughter at her decease living that shall attain the age of twenty-five years, then and in such case, I give and devise my said freehold and leasehold estates lying in Crewkerne aforesaid unto my three nephews, Henry, William, and John Higgins, and to the survivor of them, his and their heirs, executors, administrators, and assigns, equally."

The testator then gave all that his freehold estate in North Perrot, in the county of Somerset, and his leasehold estate in Misterton, to W. D. Best and Thomas Best, their heirs, executors, administrators, and assigns, upon trust to pay the rents to his daughter Bridget, for life. The will then proceeded as follows:

"And from and after her decease, I will that my said trustees, and the survivor of them, and the heirs, executors, and administrators of such survivor, do and shall receive and pay and apply the rents and profits of my said estates, or so much thereof as shall be necessary, to and for the support, education and maintenance of my said daughter's son, Robert, and all and every other son and sons as she may happen to leave, until he or they shall attain the age or ages of twenty-five years; and, on his and their attaining that age, then in trust for the said Robert, and such other son and sons, and their assigns, for and during the term of his and their natural lives, as tenants in common; and from and after their decease, then in trust for the eldest son of the said Robert, and the eldest of all and every of the sons of my said daughter Bridget, and the heirs of his or their body and bodies lawfully to be begotten, and shall survive her; and for want and in default of such issue, then in trust for all and every the daughter and daughters, and the heirs male of the body and bodies of such daughter and daughters as my said daughter Bridget shall leave behind her at her decease; and for want and in default of such issue, male or female, then in trust for my said daughter, Mary Ann Taylor,

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and her assigns, for life; and after her decease, to and for the issue, male and female, and the heirs of the body or bodies of such male and female issue of my said daughter, Mary Ann, his, her, and their heirs and assigns for ever; and for want of such issue, then in trust for my said three nephews, Henry, William, and John Higgins, and the survivor of them, his, and their heirs and assigns for ever, as tenants in common."

The testator then gave all the rest and residue of his personal estate, and all his messuages, lands, and tenements, of which he was in any way possessed or entitled, in possession or reversion, or otherwise, not thereinbefore disposed of, to Mary Ann Taylor, her heirs, executors, administrators, and assigns.

The testator died in December, 1801.

Bridget, the daughter of the testator, married Mr. Abraham, and died in 1840. She had three children; a son, who died an infant in the life of his mother; a daughter, who attained twenty-one, and also died in the life of her mother; and Robert, who attained twenty-five, and afterwards died in 1843, without issue. Mary Ann Taylor died in 1843, without ever having been married.

The bill was filed, by the residuary devisees under the will of Mary Ann Taylor, against the representatives of Robert Abraham, and of John, Henry, and William Higgins. The questions raised, were, whether the devises to Robert Abraham were void for remoteness.

Malins and *Sandys*, for the plaintiffs, contended that, under the residuary devise contained in the will, the estates (if it should be held that the devises were void for remoteness) passed to Mary Ann Taylor. *Glover v. Spendlove*, 4 Bro. C. C. 337; *The Attorney-General v. Vigor*, 8 Ves. 256; *Doe d. Earl of Cholmondeley v. Weatherby*, 11 East, 322; *Church v. Mundy*, 15 Ves. 403; *Doe v. Sheffield*, 13 East, 526; *Doe v. Scott*, 3 M. & S. 300; *Williams v. Goodtill*, 10 B. & C. 895; s. c. 8 Law J. Rep., K. B. 326. And that the devises to Robert were void for remoteness. *Porter v. Fox*, 6 Sim. 485; *Vowdry v. Geddes*, 1 Russ. & M. 203; *Watson v. Hayes*, 5 Myl. & Cr. 125; *Leake v. Robinson*, 2 Mer. 363; *Batsford v. Kebbell*, 3 Ves. 363; *Horseman v. Abbey*, 1 Jac. & W. 381; *Cambridge v. Rous*, 8 Ves. 24; *Dodd v. Wake*, 8 Sim. 615; *Newman v. Newman*, 10 Ibid. 51; *Festing v. Allen*, 12 Mee. & W. 279; 5 Hare, 573; *Bull v. Pritchard*, 1 Russ. 213; s. c. 5 Hare, 567; *Morris v. Howes*, 4 Hare, 599; *Marquis of Bute v. Harman*, 9 Beav. 320; *Boreham v. Bignall*, 8 Hare, 131; *Vanderplank v. King*, 3 Hare, 1; *Monypenny v. Dering*, 16 Mee. & W. 418; s. c. 7 Hare, 568; s. c. 15 Eng. Rep. 551.

Walker, *Bates*, and *J. Bailly*, for the children and representatives of Robert Abraham, contended, that, in the events which had happened, the Crewkerne estate had vested in Robert Abraham in fee, and that the devise was not void for remoteness. They cited *Boraston's case*, 3 Rep. 19; *Doe d. Wheedon v. Lea*, 3 Term. Rep. 41; *Edwards v. Hammond*, 3 Lev. 132; *Phipps v. Ackers*, 9 Cl. & F. 589; *Bromfield v. Crowder*, 1 New Rep. 324, affirmed in the House of Lords, see

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Sudg. Law of Real Property, 286; *Fry v. Lord Sherborne*, 3 Sim. 243; *Jones v. Machilwain*, 1 Russ. 220; *Graftley v. Humpage*, 1 Beav. 46; *Riley v. Garnett*, 19 Law J. Rep. (N. S.) Chanc. 146; *Doe d. Dolley v. Ward*, 9 Ad. & E. 582; *Bland v. Williams*, 8 Myl. & K. 411; *Farmer v. Francis*, 2 Sim. & S. 505; s. c. 2 Bing. 151; *Murray v. Addenbrook*, 4 Russ. 407; *Doe d. Bills v. Hopkinson*, 5 Q. B. Rep. 223; *Torres v. Franco*, 1 Russ. & M. 649; *Hallifax v. Wilson*, 16 Ves. 168; *Spark v. Spark*, Cro. Eliz. 666; *Cole v. Sewell*, 4 Dru. & War. 1; *Wright v. Atkyns*, 19 Ves. 299; *Doe d. Morris v. Underdown*, Willes, 293; *Upjohn v. Upjohn*, 7 Beav. 59, 152; *Watson v. Lord Lincoln*, 1 Amb. 325; *Amesbury v. Brown*, cited 2 W. Black. 739.

Giffard, for the representatives of John, Henry, and William Higgins.

Campbell, Karlake, Follett, Collins, K. Parker, Lean, and *C. M. Roupell*, for other parties.

The other cases cited were *Mogg v. Mogg*, 1 Mer. 654; *Jackson v. Majoribanks*, 12 Sim. 93; *Saunders v. Vautier*, Cr. & Ph. 240, and *Genery v. Fitzgerald*, Jac. 468.

STUART, V. C. The arguments in support of the proposition that all the limitations of the Crewkerne estate, freehold and leasehold, under the will of Robert Taylor, after the life-estate to the testator's daughter Bridget, were void for remoteness, were supported by an appeal to various authorities. But, notwithstanding the difficulty reconciling the decisions, it must be considered as well established that an immediate gift of the whole rents and profits or enjoyment of the estate, real or personal, to one until he attained the age of twenty-five, and, on his attaining that age, to him absolutely, conferred an immediate vested interest, and did not postpone the vesting until the age of twenty-five was attained. Even in the case of a mere legacy which would, upon the terms of the gift, be contingent upon the legatees attaining a certain age, it might become vested by the gift of the income or interest in the meantime; and this, to use the language of Lord Cottenham in *Watson v. Hayes*, "whether the gift of the interest in the meantime be direct, or in the form of maintenance, provided it be of the whole interest." No doubt there is difficulty in reconciling the decision in *Batsford v. Kebbell* with this now well-established principle; but the doctrines in *Boraston's case*, followed in many others and acted upon in the House of Lords in *Bromfield v. Crowder*, carried the principles still further as to devises of real estate, where words clearly importing a contingency, and which, taken by themselves, would make the event of the devisee attaining a particular age clearly a condition precedent, did not prevent the vesting even where there was an immediate gift of the rents for other purposes. In all these cases the court had struggled with the words to effect the intention. In the present case, the intention of the testator that

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Robert and all the other sons of his daughter should, on her death, take immediate beneficial interest in the whole rents and income, which, on attaining the age of twenty-five, were to become absolute and indefeasible, but which were defeasible in the case of death under twenty-five, appeared clear and beyond all doubt. If this were so, the suggestion made at the bar, that the gift of the income until twenty-five must be considered void, as part of a general scheme to postpone the vesting till twenty-five, was merely fanciful and a contradiction of the words of the will, which, however inaccurate in many respects, left no doubt of an intention the very reverse of this suggestion. It had, however, been urged that the words which referred to the event of Robert and the other sons attaining twenty-five, did not give the estate as an absolute estate to Robert or the other sons at all, but created a trust for the heirs, executors, administrators, and assigns of Robert and the other sons who might happen to attain that age. This view of the case treated the words "heirs, executors, administrators, and assigns," not as words of limitation or as enlarging the estate of Robert and the sons, but the gift to the heirs of a living person, and therefore wholly void. It was said that the previous gift of the rents and income, till twenty-five, was a mere chattel interest, and that, therefore, the rule in *Shelley's case*, 1 Rep. 93, did not apply. If it were reasonably clear, on the construction of the words of the will, that the testator intended the devisees to take an absolute interest on attaining twenty-five, there needed no resort to the rule in *Shelley's case*, which was framed in order to effectuate and not to defeat, an intention clearly expressed. Upon the language of this will, inaccurate as it is as to the disposal of the estate on the sons' attaining twenty-five, there appears no reasonable doubt. To impute to this testator an intention that, on attaining twenty-five, the estate and interest of each of the sons, instead of being enlarged to an absolute interest, should entirely cease, is to impute an intention contrary to the whole scheme of the will and to the obvious meaning of the testator in using the words "heirs, executors, administrators, and assigns" of the sons. There appears no other rational construction of these words than that which treats them as enlarging, and not destroying, the estate and interest of those sons who should live to attain the age of twenty-five. Upon the whole, therefore, I am of opinion, as to the Crewkerne estate, that, upon the true construction of this will, the gift in remainder to Robert, and the other sons of the testator's daughter Bridget, was well vested in them, although liable to be divested and go over in case of death under twenty-five; and as Robert was the only son, and lived to attain twenty-five, his estate and interest, previously vested, became then absolute and indefeasible, and the Crewkerne estate, both freehold and leasehold, passed by his will.

This view of the case renders it unnecessary to consider the argument urged on the authorities of *Leake v. Robinson*, and *Porter v. Fox* to show that, if the gift to the other sons were too remote, as not giving any vested interest till twenty-five, it must also fail as to Robert, who was associated with a class as to which the devise failed, because it

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might include some of the class as to whom it would be too remote. If it had been necessary to deal with that argument, I feel that I should have some difficulty in following the decision in *Porter v. Fox*, which appears to me not sustainable, on an accurate view of what was said by Sir William Grant in *Leake v. Robinson*. That great Judge carefully drew the distinction between a gift to an individual and a gift to a class, and, in his observations which preceded his notice of the case of *Gee v. Audley*, cited 2 Ves. jun. 365, as well as in the remarks in *Routledge v. Dorril*, Ibid. 357; I cannot see enough to convince me that I should have held that a gift to an individual named and known to the testator should wholly fail, because there were words superadded by the testator including a class to take with him, as to which class the gift must wholly fail, because as to some it might be too remote. I do not wish to be understood as doing more than suggesting that if the question should occur for decision, it should not be considered as concluded by authority. It is to be regretted that the appeal against the decision in *Porter v. Fox* was not prosecuted, so that the question might have been more satisfactorily settled. The Vice-Chancellor of England supported his judgment in that case by referring to the peculiar expressions which he considered as showing that the gift to the individual was so mixed up with the gift to the class, that, as separated from a member of the class, there was no gift to him as an individual at all. But when there is a clear gift to an individual, and a gift to a class of persons who are to take along with him, the individual and each member of the class to take as tenants in common, what remains to be shown is, how, if the class were so described as that the gift to them could not take effect, the gift to the individual should therefore also fail, any more than if, instead of the gift being to an individual and to a class of persons to take along with him, the gift were to the individual and any other number of individuals to take with him as tenants in tail, as to which other individuals the gift might happen to fail or be given in an effectual manner.

If I am right in holding that Robert took an immediate vested interest, and that the other sons of Bridget, if any, would have taken an immediate vested interest in the Crewkerne Estate, the application of the same principle would guide the construction of the will as to the estates in North Perrot and Misterton. As to these, the peculiarity is, that the gift to Robert, on attaining twenty-five, was only of a life estate, and that the immediate trust of the rents and profits, until twenty-five, was for his support, maintenance, and education, and was not an absolute gift of the whole rents and profits, but of the whole or so much as should be necessary. But the principle of *Boraston's case*, was that an intermediate interest carved out did not prevent the vesting, whether it was carved out for the benefit of the devisee or any other purpose, and whether it exhausted the whole rents and profits or only a part. No doubt if it were a gift of the personal estate merely, and the intermediate income were not given to the legatee, the words importing a condition precedent would prevent the vesting. But it was well settled that, as to the real estate, the purpose for

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which the intermediate rents and profits were given or carried out did not prevent the vesting; and it has been decided by the authorities cited at the bar, ending with *Tapscott v. Newcombe*, 6 Jur. 755, that where there are a freehold and a leasehold estate, and there is a vested estate in the freehold, the leasehold must be considered as vested also. It has, however, been argued that, upon the construction of the words, the estates given to the unborn sons of Bridget, as well as Robert, were life-estates only, with remainder to the sons of unborn sons in tail, and, therefore, too remote. There is considerable inaccuracy and obscurity in the language, but the more natural and obvious construction of the words seems to me to be that which gives an estate in tail male in remainder to the eldest son of Robert, and also an estate in tail male in remainder to the eldest brother of Robert, and not to the son of any brother of Robert. If so, the remainder over in fee to the testator's three nephews, Henry, William, and John Higgins, was a good remainder, and, in the events which happened of the failure of all the antecedent estates to it, after the life estate of Robert, took effect.

SMITH v. ROBINSON.¹

January 19 and 20, 1853.

Practice — Foreclosure Claim — Sale.

In a foreclosure claim, the defendants appeared to the claim, but, though duly summoned, did not appear at the hearing. The plaintiff asked for an immediate sale. The court declined to direct an immediate sale, but ordered that an account should be taken, and that, in default of payment within a short period, the property should be sold.

THIS was a foreclosure claim, to which the defendants had appeared. The claim was set down to be heard, and notice was given to the defendants. The claim now came on to be heard.

The defendants did not appear.

By the 48th section of the Chancery Procedure Amendment Act, it is enacted, that it shall be lawful for the court, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent encumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, &c.

Shapter, for the plaintiff, asked for an immediate sale.

¹ 22 Law J. Rep. (N. S.) Chanc. 482.

Bird v. Webster.

January 20. STUART, V. C. This claim is for foreclosure, and the question upon which I reserved my opinion was, whether, upon the construction of the 48th section of the 15 & 16 Vict. c. 86, the plaintiff is entitled to have, instead of a foreclosure, an immediate decree for sale. On looking at the words of the section, it appears that the effect of it was to supply, the want of which had been the occasion of great injustice and great expense, an authority to direct the sale of an estate which was the subject of a claim for foreclosure. Now, in the present case I am pressed for an immediate order for sale, in the absence of the parties entitled to the equity of redemption. The two defendants, who were the mortgagors, had been served with a writ of summons upon the claim, and had appeared in the cause, but did not appear now, although they had been served with notice of the claim being set down as a short claim. The prayer of the claim did not ask for a sale, and in every case, I consider that the owner of the equity of redemption is entitled to a fair opportunity to redeem. This claim, with perfect propriety, asked that an account might be taken of what was due and for payment, or, in the alternative, for foreclosure. There will be ample authority for effecting a sale hereafter, but I think it will be too harsh to direct an immediate sale, as was proposed. I shall therefore direct that my chief clerk shall ascertain the amount due on account of the mortgage, and fix a short time for payment; and that, in default of payment, the property shall be sold, with the approbation of the court.

BIRD v. WEBSTER.¹

January 18, 1853.

Will — Construction — Bequest of Personally — Absolute or Defeasible Interests.

A testator directed his property to be invested in the funds, 1,000*l.* in each child's name; and 1,000*l.* in his wife's; the interest to be received by them for life, and afterwards to their descendants; except his wife's, which was, at her death, to be divided amongst them. By a codicil, he alluded to the funds being increased, and directed the same division and appropriation to be made, except that, as any share should fall in, it was to be added to the others, in case the original holder should have no children: —

Held, that upon the will and codicil taken together, the children were only entitled to the interest of their respective shares for life, and that the share of any child dying, without children, would go over.

A QUESTION was raised upon the construction of the will of J. Bird. The testator enumerated different items of property amounting to 5,000*l.*, and then expressed his wish, in case he should die without

¹ 22 Law J. Rep. (N. S.) Chanc. 483.

Bird v. Webster.

any other will, that Mr. Webster and Mr. Stacey should ascertain the amount of his property, and invest it in the public funds, 1,000*l.* in the name of each of his children, and 1,000*l.* in his wife's name, the interest to be received by them regularly for their lives, and afterwards to their descendants, except his wife's, which was at her death to be sold out and divided amongst them, except 200*l.* to his natural child, whom he named.

This will was dated in June, 1833, and the testator made a codicil to his will, dated the 14th of January, 1834, in which he stated that his stock was increased to the sum of 5,500*l.*, and continued "I wish the same division and appropriation, except that as any share falls in, it may be added to the others, in case the original holder shall have no children. N. B. The property is always meant to descend to lawful children."

The testator died in 1834, leaving his widow and four children surviving him. This suit was instituted for the administration of his estate, and upon a reference to the Master, it appeared that a sum of 6,300*l.* constituted the estate of the testator, after payment of his debts. Two of the daughters of the testator were married, and all the children had received the interest upon their shares up to the present time. The widow had died lately, and a petition was now presented, on behalf of all the children, praying that they might be declared entitled each of them to one fourth of the fund absolutely.

C. Hall appeared in support of the petition for the unmarried daughters, and contended that the words of the testator's will being applied to personalty, gave them an absolute interest in their shares, and not a life estate only, although it would have been different if the property had been realty; and cited:—*The Attorney-General v. Bright*, 2 Keen, 57; *Wyth v. Blackman*, 1 Ves. sen. 196; *Garth v. Baldwin*, 2 Ibid. 646; *Chandless v. Price*, 3 Ves. 99; *Jordan v. Lowe*, 6 Beav. 350.

Barker appeared for the trustees of the married daughters, and

Freeling, for the executors of the testator.

KINDERSLEY, V. C. This will, which was evidently written by the testator himself, is very inartificially framed, and there is every probability that he contemplated having another will prepared; still the language is not ungrammatical, and the general intention is apparent. The document, although written upon one sheet of paper, bears two different dates, and may, therefore, be considered as a will and codicil. The testator, in the first place, gives the property to his trustees to invest in the public funds, 1,000*l.* in each child's name, and 1,000*l.* in his wife's; the interest to be received by them regularly for their lives, and afterwards to their descendants. The effect of this would be to give the children an absolute interest, the property being personalty, though if it were realty, it would be an estate tail. The testator then says, "except my wife's, which is, at her death, to be divided amongst

In re Colquhoun.

them." The word "them" must mean the four children, and not their descendants, so that the wife's 1,000*l.*, after her death, would go to the children absolutely. But then comes the subsequent instrument or codicil, and in that the testator appears to me to put his own interpretation upon the whole gift. The words are "The above stock is increased to about 5,500*l.* I wish the same division and appropriation, except that, as any share falls in, it may be added to the others, in case the original holder shall have no children." By this it is clearly intended that upon the death of either of the children without having children, that child's share should be added to the other shares. My opinion, therefore, is, that at present the children are only entitled to the income for their lives. Whether the testator meant that in case either of the original holders should never have children, or whether there were to be no children living at the death of the tenant for life, it is not now necessary to decide; but according to the construction I put upon the will, if the petitioners were right in contending that they each took an absolute interest, these interests would be liable to be defeated by dying without children. Under these circumstances, all I can at present decide is, that the daughters are only entitled to the income for their lives.

*In re COLQUHOUN.*¹

January 15 and February 12, 1853.

Costs — Solicitor — Liability of Defendants acting together in a Suit.

A was retained by four persons, B, C, D, and E, defendants to a suit in chancery, to act for them in the suit. A took some steps for B and C jointly, and other steps for B, C, and D, jointly, and so on. A delivered his bill of costs to B, which, at the instance of B, was referred to the Master for taxation. The Master taxed the bill on the principle that, for the joint costs of B and C, B was liable for half only; for the joint costs of B, C, and D, B was liable to a third only, and so on:—

Held, that, according to the practice of the court, this method of taxation was right.

Mr. COLQUHOUN was retained by Dr. Ford and four other persons, defendants in a suit, to act for them as their solicitor in the suit. Mr. Colquhoun took some steps in the suit affecting equally Dr. Ford and one other of such persons only; and other steps affecting equally Dr. Ford and two other of such persons, and other steps affecting equally Dr. Ford and three other of such persons. A bill in respect of business so done, amounting to 11*l.* 13*s.*, was delivered to Dr. Ford.

By an order of course, at the instance of Dr. Ford, this bill was referred to the Master for taxation.

¹ 22 Law J. Rep. (N. S.) Chanc. 484; 17 Jur. 409.

In re Mole.

The Master taxed the bill on the principle that, where business had been done affecting equally Dr. Ford and one other person, Dr. Ford was liable only for half of the costs of it; and that, where business had been done affecting equally Dr. Ford and two other persons, Dr. Ford was liable only for one third of the costs of it, and so on. The result was, that the bill was reduced to 48*l*., from which the costs of taxation had to be deducted.

This was a petition presented by the assignees of Mr. Colquhoun, who had been made a bankrupt, for liberty to except to the taxation, on the ground that each of the clients was, as between such client and Mr. Colquhoun, liable to pay to Mr. Colquhoun the full ordinary costs of suit, where the same were not increased by reason of the step being taken on behalf of more than one defendant.

Russell and Hislop Clarke, for the petition.

Glasse and C. Hall, for Dr. Ford.

STUART, V. C. It appears that the Taxing Master has in this case acted on the practice of the court. The taxation is on a principle extremely inconvenient and unjust, because it deprives the solicitor of what seems to be his reasonable remuneration for professional work and labor. There is no doubt, from the communication which I have received from two of the Taxing Masters, that, if Colquhoun had brought an action against Dr. Ford for the amount of his bill of costs he would have recovered the whole amount of the bill. The order restrained his legal right, and sent him to have a taxation according to the practice of the court. This claim, then, for which he had a legal right, is reduced to 39*l*., the whole cost of the taxation being thrown on Colquhoun. This is an evil for which I have no remedy. It rests with the Lord Chancellor, who has the power to apply the proper remedy. Lamenting, as I do, that I have not the authority to interfere, I hope that the matter will go before a higher tribunal, where it ought unquestionably to be taken.

*In re MOLE.*¹

December 22, 1852.

Practice — Solicitor's Costs — Trustee.

A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee.

¹ 22 Law J. Rep. (N. S.) Chanc. 455.

King v. Isaacson.

THIS was a petition by a *cestui que trust* for the delivery and taxation of certain bills of costs which had been paid by the trustee.

Speed, for the petition, referred to the 6 & 7 Vict. c. 73, s. 39.

Freeling, for the trustee, objected to his having been served with the petition, and contended that he was not a necessary party.

STUART, V. C., (after consulting with the Registrar,) said — That it was not the practice to bring the trustee before the court upon such a petition, and he should, therefore, dismiss the petition as against the trustee with costs.

KING v. ISAACSON.¹

February 21, 1853.

Will—Construction—Vested or Contingent Estates.

A testator gave all the residue of his real and personal estate to trustees, upon trust to convert and invest his personal estate, and to pay the interest, income, and rents to A for life, and declared that they should, as soon as conveniently might be after the decease of A, convey, pay, assign, transfer and make over the residuary real estates and the trust moneys and premises unto and among all and every the child and children of A, as and when they should severally and respectively attain their ages of twenty-one years, as tenants in common, and their respective heirs, executors, and administrators; and, if there should be but one child, then to such child, his or her heirs, executors, and administrators. A died, leaving three children, two of whom died in their infancy:—

Held, that all three children took vested indefeasible interests in the real and personal estate.

W. NORRON, by his will, dated the 21st of July, 1823, gave all the rest and residue of his real and personal estate to trustees; and directed them to convert and invest the personal estate, and to pay the income of the real and personal estate to his wife, for her life, and, after her death, “to pay two thirds of the interest, dividends, and annual proceeds, rents, issues, and profits” to his niece Mary Travis, for life, and the other one third to his niece L. N. Travis for life. The will then proceeded as follows:—“And upon trust that my said trustees, or the survivor of them, or the executors or administrators of such survivor, as soon as conveniently may be after the decease of my said nieces, or either of them, convey, pay, assign, transfer, and make over all the residue of my real estate, and all the residue of the said trust moneys and premises, after fully providing for and answering the trusts and purposes hereinbefore expressed in this my will, in the shares and proportions following, that is to say, upon the decease of my said niece Mary Travis, to convey, pay,

¹ 22 Law J. Rep. (N. S.) Chanc. 455; 17 Jur. 434.

King v. Isaacson.

assign, transfer, or make over two equal third parts or shares of the said residuary real estates, and also of the residue of the said trust moneys and premises unto and among all and every the child and children of my said niece Mary Travis, as well daughters as sons, as and when they shall severally and respectively attain their respective ages aforesaid of twenty-one years, to and for their own absolute use and benefit as tenants in common, and not as joint tenants; and to their several and respective heirs, executors, administrators, and assigns, according to the nature and quality of such estates: and if there shall be but one child of my said niece Mary Travis, then to such only child, his or her heirs, executors, administrators, and assigns, according to the nature and quality of such estates, and to whom I give, devise, and bequeathe the same accordingly; and upon the decease of my said niece, L. N. Travis, to convey, pay, assign, transfer, or make over the other or remaining equal third part or share of my said residuary real estate, and also of the residuary of the said trust moneys and premises," &c. (following the same form as in the gift to the children of Mary Travis.)

The testator died in 1837, and his widow died in 1846. L. N. Travis married Mr. King in 1832, and died in 1844, leaving three infant children. Two of these children died infants, one in 1845, and the other in 1846.

The bill was filed by the surviving infant child of Mrs. King, for the purpose of obtaining the decision of the court as to the construction of the will.

Walker and *Giffard* for the plaintiff, contended that all the children took vested interests in the property liable to be divested in case of dying under twenty-one, and cited *Harrison v. Grimwood*, 12 Beav. 192; *In re Bartholomew's Trust*, 1 Hall & Tw. 565; s. c. 1 Mac. & Gor. 354; *Saunders v. Vautier*, Cr. & Ph. 240; *Doe d. Wheedon v. Lea*, 3 Term Rep. 41; *Genery v. Fitzgerald*, Jac. 468; *Gibson v. Lord Monfort*, 1 Ves. sen. 485; *Hunter v. Judd*, 4 Sim. 455; *Phipps v. Ackers*, 9 Cl. & F. 583.

Follett and *Rosseter*, for the heir at law and next of kin of the testator.

Alderson and *Borton*, for other parties.

Russell and *Allnutt*, for the heir at law and administrator of the infant children, were not called upon.

STUART, V. C. Although the words of the will create great difficulty, I am, on the whole, satisfied as to the true construction of it. The question is, whether *Hanson v. Graham*, 6 Ves. 239, and that class of cases are to apply, or whether I am to hold that none of the children could take a vested interest until they attained the age of twenty-one years. Notwithstanding the difficulty upon the words used here as to attaining twenty-one, yet, looking at the whole will

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from the direction to convey upon the deaths of the nieces up to the ultimate gift of an absolute interest to one child, I consider that every child, on being born, acquired a vested interest. Immediately on the death of each niece, there is a direction "to convey, pay, assign, transfer, and make over." There is no doubt that, on the death of each, it was the intention that something should be done — that something should accrue. There is a difficulty as to the attaining twenty-one, but that the testator directed an immediate conveyance is certain. There is no doubt that, if such a conveyance was to be made, it was to be to the whole class of children, and that the conveyance was to be to them as tenants in common in fee. There is also no doubt that, if there was only one child, the conveyance was to be without any words importing that he was to take nothing unless he attained the age of twenty-one. With all these matters certain, the difficulty arises from the words "as and when they shall severally and respectively attain their several and respective age and ages of twenty-one years to and for their own absolute use and benefit," &c. These words import that, when and as the children should attain twenty-one, they should take absolute interests as tenants in common. When I find a direction that, immediately on the death of the mother, the trustees are to convey, I can only hold that the testator, when referring to twenty-one, meant an enjoyment in possession, and not a vested interest. It is a far wiser rule to hold that children take vested interests than contingent, for the hardship is enormous where a child dies under twenty-one, leaving issue. The present case is relieved of great difficulty by the ultimate gift to one child. Looking, then, at the whole will, I hold that each child, as it came into *esse*, took an indefeasible interest in the whole property.

 FRAIL v. ELLIS.¹

December 8 and 9, 1852.

Vendor and Purchaser — Purchase-Money — Payment — Special Contract — Lien — Security — Notice.

A special contract for the payment of purchase-money must be explicit to deprive a vendor of his lien upon the estate sold; and though a contract is stated in the conveyance of the estate, evidence may be given to show the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien.

Where an estate was expressed to have been conveyed in consideration of 150*l.* down and a bill of exchange for 300*l.* payable in three months:—

Held, that the vendor might give evidence of the real nature of the transaction, and that his lien was not discharged; and a mortgagee having notice through the solicitor who had been employed in all the transactions, was bound to see that the vendor's claim for his purchase-money was satisfied.

¹ 22 Law J. Rep. (N. S.) Chanc. 467.

Frail v. Ellis.

THIS bill was filed by James Frail, a gunsmith, the vendor of a house and premises in Three Colt Street, Bow, in the county of Middlesex, against Charles Lloyd, the purchaser, and Alexander Ellis, a mortgagee, with a power of sale, and against Edward Lawrence Levy, who in all the transactions had acted as the solicitor of the parties, and David Lawrence Levy, his partner, to obtain a declaration that the plaintiff was entitled to an equitable mortgage upon the premises for 300*l.*, the balance of unpaid purchase-money, and for 15*l.* and 10*l.* advanced by the plaintiff to C. Lloyd in priority over a mortgage made by C. Lloyd to A. Ellis, dated the 5th of February 1850. It also asked for the consequential accounts and payment, or that A. Ellis and Messrs. Levy might be foreclosed, or that the hereditaments might be sold, and the amount due to the plaintiff paid, with costs. It also asked that the title-deeds might be delivered to the plaintiff or deposited in this court, and that the defendants might be restrained from selling the premises or parting with the title-deeds, and also for a receiver.

James Frail, on the 30th of November, 1849, agreed to let the premises in Three Colt Street, of which he was seised in fee, to Charles Lloyd, at a rent of 28*l.* a year, and on the 15th of December following he was let into possession. After the agreement, C. Lloyd expressed a wish to purchase the premises; and finally it was agreed that C. Lloyd should become the purchaser, for the sum of 450*l.* He stated his inability to pay the whole of the purchase-money, but offered to pay a part, and alleging, untruly as it was stated, that he had sold a farm at Dunstable, he also offered to give good security for the remainder, to which the plaintiff assented.

The plaintiff, on the 26th of December, 1849, was induced to accompany C. Lloyd to the office of E. L. Levy, his solicitor, who, on the 1st of February, 1850, took D. L. Levy into partnership, and after proposing to pay 100*l.* as part of the purchase-money, and to give a bill of exchange at three months' date for the remaining 350*l.*, the plaintiff agreed to take 150*l.*, upon having the remainder properly secured, and at the same time the plaintiff left his title-deeds with E. L. Levy, who signed the following paper:—"To Mr. James Frail.—I acknowledge that you have left with me an assignment of a piece of ground from — Cuerton, Esq. to Joseph Frail, in order to prepare an assignment or conveyance to Mr. C. Lloyd of the piece of ground and the house erected thereon." At the same time the plaintiff was required to sign the following paper:—"To Mr. Charles Lloyd. — I hereby agree to sell to you the piece of ground and house and stable erected thereon, situate, &c., and to assign and convey the same over to you as soon as Mr. Levy has prepared the necessary deeds," &c.; and reference was made to the original memorandum.

On the 8th of January 1850, E. L. Levy wrote to the plaintiff, informing him that "the deed" was ready to be signed, and on the following day he went to his office and there met C. Lloyd, and in answer to a question of E. L. Levy he refused to take the bill of exchange of C. Lloyd for 300*l.* and said he must have a mortgage for the balance of the purchase-money.

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On the 12th of January, 1850, there was another meeting of the same parties. E. L. Levy said he had got all the deeds ready, and, in consequence of the plaintiff objecting to sign the deed of conveyance, E. L. Levy told the plaintiff he had no occasion to be afraid, as he had made it doubly secure and had prepared a mortgage-deed; at the same time he held up a bundle of documents, upon which the plaintiff said to him, "If you say it is all right, I will trust you." That E. L. Levy then said, "It is all right: come, Mr. Frail, and sign the deed." A deed, dated the 12th of January, 1850, was then produced and read; it was between J. Frail of the one part and C. Lloyd of the other part, and in consideration of 150*l.* expressed to be paid to the plaintiff, and of the further sum of 300*l.* expressed to have been agreed to be paid by C. Lloyd to the plaintiff in three months from the date of the indenture, and to be secured by a bill of exchange drawn by J. Frail upon and accepted by C. Lloyd, and payable at three months after date, J. Frail conveyed the house and premises unto and to the use of C. Lloyd, his heirs and assigns.

On the same 12th of January, 1850, E. L. Levy wrote out a bill of exchange for 300*l.*, payable to the plaintiff in three months after date, which was signed by the plaintiff as the drawer and C. Lloyd as the acceptor. The costs of preparing the conveyance, &c., amounted to 20*l.* C. Lloyd was unable to pay them, and the plaintiff lent him 15*l.*, which was paid to E. L. Levy in satisfaction of the amount. E. L. Levy then made a demand upon the plaintiff of 8*l.* 10*s.*, as the amount of costs for preparing the mortgage-deed; but as he had not made out any bill, the plaintiff asked for a receipt, which E. L. Levy gave, as follows: — "Received, this 12th day of January, 1850, of Mr. James Frail, the sum of 8*l.* 10*s.*, the costs of preparing the mortgage-deed," &c.; which last words were substituted at the plaintiff's request for the word "agreement." The plaintiff then asked for the mortgage-deed and for the other papers, but E. L. Levy said he wanted to make copies of them, and the plaintiff could have them at any time he was passing.

On the 21st of January, 1850, the plaintiff advanced to Charles Lloyd the sum of 10*l.*, but upon calling, according to appointment, at the house, in Three Colt Street, where C. Lloyd resided, to receive payment of the whole amount due, he found no person in the house, and was informed that C. Lloyd and his family had left at six o'clock that morning, and gone whither no one knew. The plaintiff then went to the office of Messrs. Levy; he informed them that C. Lloyd had decamped, and asked for the deeds and writings, but a copy of his father's will and two certificates were alone handed to him; and upon asking for the mortgage he had paid for, E. L. Levy said it was of no use to the plaintiff, and that he had burnt or otherwise destroyed it.

On the 15th of April, 1850, the bill of exchange arrived at maturity, but when presented it was dishonored.

On the 5th of July, 1850, conditions of sale were printed and circulated by the direction of E. L. Levy and D. L. Levy, announcing a sale of the premises by auction, by Mr. Bingham, on Tuesday, the 9th of

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July, 1850, at Garraway's Coffee House, Change Alley, at one o'clock, by order of the mortgagee, under an absolute power of sale; and Messrs. Levy were therein described as the solicitors of the mortgagee. Upon this the plaintiff searched the registry office in Middlesex, from which he found that on the 5th of February, 1850, C. Lloyd conveyed the premises in Three Colt Street to Alexander Ellis, an outfitter in the Minories, and his heirs, by way of mortgage, to secure the sum of 300*l.* and interest, and this deed was signed by C. Lloyd and A. Ellis, and E. L. Levy, and by Henry R. Walthew, a clerk of Messrs. Levy. The plaintiff said he had not been able to discover whether any consideration had been paid for this mortgage; that the deed had been prepared by Messrs. Levy, as the solicitors for C. Lloyd and A. Ellis, and that the latter had full notice of all the facts relating to the purchase; and he insisted that he was an equitable mortgagee upon the premises, not only for the balance of the purchase-money, but also for the sums of 15*l.* and 10*l.* lent to C. Lloyd. The plaintiff then served the auctioneer with a notice, protesting against the sale, and attended the auction, but no sale was effected. The bill then charged that the deeds remained in the custody of Messrs. Levy, but that they intended to part with them, and with the deed of the 12th of January, 1850, to deprive the plaintiff of his equitable lien upon the title-deeds; and that they had got into the receipt of the rents, and intended to apply them to their own purposes.

In November, 1850, an injunction was granted to restrain the defendants from parting with the deeds.

A. Ellis, by his answer, said that he was a stranger to the whole of the matter alleged in the bill previous to the 5th of February, 1850, when he advanced 350*l.* upon the mortgage of the premises, *bonâ fide* and without notice of any of the facts stated in the bill; that E. L. Levy applied to him for the loan, and that on the 6th of February, 1850, he paid the 350*l.*, when C. Lloyd represented that he was about to pay the bill of exchange.

R. Palmer and Haddan, for the plaintiff. Mr. Ellis advanced his money upon a mortgage of the premises, with full notice of the vendor's equity in every sense of the word. No contract was made to take paper for money; on the contrary, a mortgage was not only agreed upon, but paid for. There were, therefore, both lien and mortgage. Mr. Ellis admits that he had notice; he knew that a bill was given and not paid, and he was satisfied with being told that it was to be paid out of the money he advanced. The purchase-deed recites the contract for 450*l.* The payment was alone varied, the receipt for the costs was also altered from "agreement" to "mortgage-deed." Mr. Ellis, therefore, had notice of all these things through Messrs. Levy, his solicitors. 3 Sugd. Vend. & Pur. 193, n. 10th edit; *Teed v. Carruthers*, 2 You. & C. C. 32; *Beadles v. Birch*, 10 Sim. 332; 15 & 16 Vict. c. 86, s. 48.

Roupell and Bush, for Mr. Ellis. The purchase-deed shows that there was a special contract respecting the purchase-money. If the

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deed alleges payment, the vendor may show the truth of the case, but was that the case where a special contract appeared in the deed? *Winter v. Lord Anson*, 1 Sim. & S. 445; *Mackreth v. Symmons*, 15 Ves. 329; *Clarke v. Royle*, 3 Sim. 499; *White v. Wakefield*, 7 Sim. 401, and *Buckland v. Pocknell*, 13 Sim. 406. But if evidence was not excluded, the circumstances show that a special contract was made, which deprived the plaintiff of any lien upon the estate. *Parrott v. Sweetland*, 3 Myl. & K. 699; *Hewitt v. Loosemore*, 9 Hare. 449; s. c. 9 Eng. Rep. 35; *Kennedy v. Green*, 3 Myl. & K. 655; *Blair v. Bromley*, 5 Hare, 542, affirmed, 2 Phill. 354.

Lloyd and Southgate. E. L. Levy is not properly made a party to this bill. The case attempted to be made against him is, that he is in possession of the title deeds, and that the defendants in consequence contemplated a deviation of the purchase-money; but this is denied; and as the solicitors of Mr. Ellis, the Messrs. Levy, can have no lien for costs, Mr. Ellis is entitled to the deeds, and can obtain them through a rule from the Queen's Bench. *Reynell v. Sprye*, 21 Law J. Rep. (n. s.) Chanc. 633; s. c. 13 Eng. Rep. 74.

Temple and Forbes, for D. L. Levy, were not called on.

Charles Lloyd did not appear.

THE MASTER OF THE ROLLS. The question is, whether the plaintiff has by any contract discharged the land from his lien for the purchase-money. Two questions are raised as against Mr. Ellis; whether the original contract was to sell for 150*l.* and a bill of exchange for 300*l.*, or whether it was to sell for 450*l.*, with a subsequent agreement to take a bill of exchange for 300*l.*, and whether it was to be taken as a security, or as a substitution for unpaid purchase-money. It is also a question whether Mr. Ellis had notice of the transactions.

Upon the first point there is conflict and contradiction of testimony. It is said that the form of the deed concluded the question, and that the agreement was to take 150*l.* and a bill of exchange for 300*l.*; but with that I cannot concur, since, in accordance with the cases, it is lawful for the parties to bring before the court the real nature of the transaction. The original contract is now produced, and it states that the plaintiff agreed to sell for 450*l.* Then came the acknowledgments for the deeds by E. L. Levy to prepare the conveyance, and the original agreement was then produced. This was followed by the next paper, which the plaintiff was then required to sign. It is then said that the plaintiff consented to take 150*l.* down, and a bill of exchange for 300*l.* at three months; it was then in evidence that both the plaintiff and C. Lloyd left the office together, but that the plaintiff came back, and pointed out that the terms of purchase were not mentioned in the agreement, and desired that they should be introduced, and that accordingly E. L. Levy introduced "The consideration being 150*l.* down, and a bill for 300*l.* at three months;" and that whilst he was writing, C. Lloyd came back and sanctioned it; but

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could this be satisfactory? I have but little doubt that the court would not have forced the plaintiff to execute any conveyance under any such agreement, but it did not appear that the plaintiff from that time considered himself bound to accept payment in that way; he consulted other persons, and applied to C. Lloyd for something further. He desired to get a mortgage, and there is nothing to show that he agreed to waive payment of the purchase-money. I adopt the expressions used in *Teed v. Carruthers*, and cannot consider that this was the contract. The plaintiff says he was to have a mortgage, or that some bill was to be discounted and the money brought to him, and that he said he would not put his name to a bill. On the 12th of January, 1850, however, there was a meeting to arrange, and here again there is a conflict. The evidence of the plaintiff differs from that of E. L. Levy. It is not unusual to hear it argued where the facts sworn to are identical, that it is a story cut and dried, that the facts are concocted, and on the other hand, when they are inconsistent that they ought not to be regarded. The court, however, is bound to see whether there is any inconsistency, and, though slight discrepancies may exist, to consider whether the evidence upon the whole is consistent with itself. Did, then, the plaintiff execute the deed of conveyance under the idea that a mortgage was to be executed to him? It is true that in the pleadings a bundle of deeds was referred to, while in the evidence one deed alone is mentioned; but throughout it is represented that E. L. Levy said he had made it doubly secure, and that C. Lloyd had executed to the plaintiff a mortgage-deed. The plaintiff and E. L. Levy are interested; both gave their evidence under a bias, but that was not the case with Mr. Rowland, whose testimony there is nothing to impeach. He distinctly said he was present on the 12th of January, 1850, at the request of the plaintiff; that he waited at Mr. Levy's office until Mr. Frail came, and when he came, they both went into Mr. Levy's private room, and found Charles Lloyd seated there; that a conversation ensued respecting the bill for 300*l.*, which was to be given in part of the purchase-money, and that Mr. Frail asked Mr. Lloyd why he had not waited at Mr. Bowie's, by whom the bill was to have been discounted, to meet him; that Mr. Lloyd's reply was that he thought it would be no use his doing so, as he would go and get the bill discounted as soon as the business was settled; that Mr. Frail replied, "No; you had better go with my friend and get it done at once;" that Mr. Lloyd got angry and talked about his integrity, upon which Mr. Levy went into the outer office and fetched some document, which looked like parchment, and on returning said, "Why should you be frightened? I have made you doubly secure, I have prepared a mortgage deed, and the bill is as good as gold;" and upon Mr. Frail observing "that E. L. Levy had said that Mr. Lloyd had refused to give a mortgage," Mr. Levy said, "but I have done it;" to which Mr. Frail said, "That is all I want, I only wish to be made secure." But this was not all; there was the receipt for the costs of preparing this mortgage deed. E. L. Levy drew it at first as for an "agreement," but upon the observation of Mr. Frail, he altered this word to "mort-

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gage deed." He, no doubt, would not have given that receipt had it not been that the plaintiff understood he was to have a mortgage deed, neither would he have so expressed it had he only prepared a draft hoping that C. Lloyd might be induced to execute a mortgage. I cannot, therefore, say that the plaintiff entered into any contract to accept a bill of exchange; and that being so, he has never lost his lien upon the estate. Mr. Levy also said that the plaintiff should have the mortgage deed in a day or two, but that he did not call for six weeks after, but this cannot make any difference.

Had, then, Mr. Ellis notice of these facts? It may be obtained through a solicitor acting for a party, and it must have been through E. L. Levy that Mr. Ellis became aware that the balance of the purchase-money was not paid, and that the contract was such that the vendor had not lost his security upon the estate; he was also bound to inquire whether the bill of exchange was given in substitution of the lien upon the estate. No indifferent solicitor would have allowed a mortgagee under such circumstances to complete his mortgage without seeing to the application of the purchase-money. It, therefore, became unnecessary to inquire whether Mr. Ellis had notice of any fraud, his notice of the lien being sufficient. I must, therefore, declare, that the plaintiff has not lost his lien, and that it is the first charge upon the estate; and I must direct its payment, with interest, from the day the bill of exchange arrived at maturity, or otherwise make a decree of foreclosure against Mr. Ellis. I must also continue the injunction to prevent the Messrs. Levy from parting with the title deeds. But if the property is redeemed, the deeds must be delivered to the plaintiff; and as he has introduced a case of collusion between the defendants which fails, the consequences must fall upon the plaintiff. I must, therefore, refuse him the costs against E. L. Levy, but he must pay the costs of David L. Levy, as no case has been made against him; and these must not be added to the security against Mr. Ellis.

TUCKER v. HERNAMAN.¹

April 13, 1853.

Bankrupt — Administration Suit.

In 1815, A, a trader in Somersetshire, was made a bankrupt, but did not obtain his certificate. In 1817, A recommenced business in Suffolk, which he continued to carry on until his death, in 1852. A appointed B his executor, who proved the will. On the petition of one of the creditors of A, subsequently to the bankruptcy, an order was made by the commissioner of the district in which A had been made a bankrupt, that the official assignee of A's estate should administer his estate by paying first the funeral and testa-

¹ 22 Law J. Rep. (N. S.) Chanc. 487; 1 Equity Rep. 25; 17 Jur. 450.

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mentary expenses of A, and his creditors subsequently to the bankruptcy, then the creditors previously to the bankruptcy, and handing over the surplus to B as executor. A claim was afterwards filed in chancery by B for the administration of the estate of A : —

Held, that, notwithstanding the order made by the commissioner, the estate of A ought to be administered by B, as executor, and that the usual administration decree ought to be made on the claim.

In August, 1815, a commission of bankruptcy issued against Mr. Elswood, who was in practice as an attorney at Chard, in Somersetshire, as a scrivener. Mr. Elswood did not obtain his certificate. In 1817, Mr. Elswood went to Bungay, in Suffolk, and there set up business as an attorney, which he continued until his death. He died in July, 1852. During the whole of this time the assignees and the creditors, previously to his bankruptcy, did not interfere with, or disturb him. Mr. Elswood, at his death, was possessed of considerable personal estate, and was largely indebted to different persons in respect of debts incurred subsequently to the bankruptcy.

Mr. Tucker and Mr. Templer were appointed executors by Mr. Elswood, and they proved the will.

After the death of Mr. Elswood the proceedings in his bankruptcy were removed into the District Court of Bankruptcy at Exeter, and, on the 30th of August, 1852, Mr. Hernaman was appointed official assignee, and forthwith took possession of a considerable part of the property of Mr. Elswood.

In October, 1852, a petition was presented to the commissioner by a creditor of Elswood, whose debt was incurred subsequently to the bankruptcy, praying for priority of his claim over the creditors previously to the bankruptcy. Upon this petition the commissioner made an order that notice should be published in some newspapers circulating at Bungay, calling on the creditors of Elswood to send the particulars of their claims to Mr. Hernaman, and that all sums of money due to such creditors be paid to them out of the first money to be got in and received by the assignees of Elswood, with the funeral expenses and the expenses of the executors in proving his will, and otherwise, to be ascertained and settled by the registrar of the court if the parties should differ about the same; and that the residue of his estate and effects be applied in payment of the costs, charges, and expenses of the petition, or incurred and to be incurred in the prosecution of the said commission, and then in the payment of the debts due to creditors who had proved, or should thereafter prove, any debts under the commission; and that any surplus which might then remain should be paid over by the assignees to Tucker and Templer as such executors.

This order was not appealed from.

A claim was afterwards filed by Mr. Tucker, one of the executors, against Mr. Templer, the other executor, who had refused to become a plaintiff with him and Mr. Hernaman, for the administration of the estate of Mr. Elswood.

Bacon and *Schomberg*, for the plaintiff, contended that, as it was admitted that the subsequent creditors were to have priority over the

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creditors previously to the bankruptcy, the estate ought to be administered by the executors, under the protection of the Court of Chancery, the surplus, after payment of the costs of the suit, the funeral and testamentary expenses, and subsequent creditors, to be handed by the executors to Mr. Harnaman, to be applied for the benefit of the creditors previously to the bankruptcy.

J. V. Prior contended, that the estate ought to be administered by Mr. Hernaman in the manner pointed out in the order made by the commissioner.

H. Prior, for Mr. Templer.

The following cases were cited: *Troughton v. Gitley*, 2 Amb. 630; *Everett v. Backhouse*, 10 Ves. 94; *Ex parte Storks*, 3 Ves. & Bea. 105; *Ex parte Bourne*, 2 G. & J. 137; *Meux v. Smith*, 1 Mont. D. & D. 396; s. c. 2 Ibid. 789; *Ex parte Jungmichel*, Ibid. 471.

STUART, V. C. This is a question of some novelty and difficulty. The testator became bankrupt in 1815, and did not obtain his certificate. He afterwards entered into business, and lived for thirty-seven years after his bankruptcy, and during that time amassed considerable property and became indebted to divers persons. It is admitted that the subsequent creditors have a right to be paid their debts out of the assets left, and that the creditors anterior to the commission only come in after the subsequent creditors have been paid in full. I have to consider the position of the plaintiff, who has proved the will and possessed assets, as against his co-executor and the official assignee, who has possessed himself of the bulk of the property. It was decided by *Troughton v. Gitley*, that the assignee of a bankrupt, who has neglected his duty in suffering the bankrupt to contract debts and amass property, is to be postponed to subsequent creditors. The prior right of the subsequent creditors must be established against the executor. I cannot hold that the jurisdiction of the court is to be ousted, or the executors to be affected by the order made in the bankruptcy. It has been said that the bankrupt had no right to appoint executors of any thing except the surplus. I cannot hold this without overruling *Troughton v. Gitley*. There is the difficulty, that the commissioner in the bankruptcy has exercised a jurisdiction. This may be very laudible, but I cannot hold it to be effectual, as it deprives the executors of the power of acquitting themselves. There must be the usual order for administering the estate of Elswood, prefaced with a declaration of the right of priority of the subsequent creditors.

Wilde v. Davies.

WILDES v. DAVIES.¹

March 7, 8, and 9, 1852.

Will — Construction — Produce of Real Estate — Legatee — Thellusson Act — Legacy to Executor.

A testator, by his will, devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts, for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A, B, and C his residuary legatees: —

Held, that A, B, & C were entitled to the surplus produce of the copyhold estates.

A testator devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trust, out of the income to pay 400*l.* a year for the maintenance of his son D, until his death or recovery from a mental malady, and to accumulate the rest of the money; and directed them, if his son should so recover, to pay him all the accumulations; and, if his son should die without having so recovered, to apply the accumulations as therein mentioned, and appointed A, B, and C his residuary legatees. The son lived more than twenty-one years after the death of his father: —

Held, that the trust for accumulation was void at the end of the twenty-one years from the death of the testator, and that the accumulations arising from the rents after that time belonged to the heir, and not to the residuary legatee.

A testator gave to E 200*l.* and appointed him to be his executor; and declared that, if his (the testator's) son should not recover from his then mental malady, then he gave E 200*l.* E did not prove the will: —

Held, that E was entitled to both legacies.

CHARLES HIPPUFF, at the date of his will, had an only son, C. D. Hippuff, who was a lunatic.

C. Hippuff made his will, dated the 11th of August, 1815, and thereby gave and devised all his freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, unto M. W. Clifton, and G. Davies, their heirs, executors, administrators, and assigns, upon trust, out of the rents to pay such sums of money, not exceeding the yearly sum of 400*l.*, for the maintenance and benefit of his son, C. D. Hippuff, during the continuance of his then malady, as they should think fit; and to invest the residue of the said rents, issues, and profits, during the life of his son, or until his recovery from his then malady, in the public stocks or funds, or on government or real securities, and also the interest and dividends of such stocks, funds, and securities, in the purchase of like stocks, funds, and securities, so that the dividends, interest and produce might accumulate during the life of his son, on his recovery; and, when it should be certified, in manner therein mentioned, that his said son was capable of managing his own affairs, then he gave, devised, and bequeathed the freehold, copyhold, and leasehold estates, and such accumulations of rent, issues, and profits thereof unto his son, C. D. Hippuff, his heirs, executors, administrators and assigns; but, in case

¹ 22 Law J. Rep. (N. S.) Chanc. 495.

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his said son should not recover from his then malady, then, after the decease of his said son, he gave, devised, and bequeathed all his said freehold, copyhold, and leasehold estates unto the said M. W. Clifton and G. Davies, their heirs, executors, administrators, and assigns, respectively, upon the usual trusts for sale, and directed them to hold the purchase moneys upon the trusts thereafter declared.

The testator then gave several legacies, payable immediately after his death. He then gave his personal estate upon the same trusts for accumulation as were declared of his real estate. The testator then declared that his trustees should stand possessed of the moneys to arise from the sale of his said freehold, copyhold, and leasehold estates, and the accumulations to arise from the rents and profits thereof, and also the stocks, funds, and securities, in which the residue of his personal estate should be laid out and invested, and the accumulations thereof as aforesaid, upon the trusts thereafter declared. The testator then gave a number of legacies to a large amount. The will did not contain any residuary bequest.

The testator made a codicil, also dated in August, 1815, whereby he merely gave more legacies.

The testator made a second codicil to his will, dated the 14th of October, 1815, which was unattested. This codicil was in part as follows:—“ And should it please God that my son quits this world under the present malady, I then bequeathe unto the before-mentioned Misses Stewards the sum of 500*l.* each. I also, under the above-mentioned case, give and bequeathe to Thomas Wildes, sen., 1,000*l.* in addition. Also, to M. W. Clifton, under the like circumstances respecting my son, the sum of 1,000*l.* Also, under the like circumstances, the sum of 500*l.* to the Orphan School, Islington Road. Also, 200*l.* to the Society for Relief of Deaf and Dumb Children, Grange Road, but under the circumstances before-mentioned respecting my son. And I have to observe, that all the legacies, in my will and codicil mentioned, are to be paid; but, if legacies are named more than the property will yield, (of course reserving sufficient to pay the 400*l.* on account of my son,) then the legatees must be paid less, or wait till the decease of my son; and I now name Mr. Flint, M. W. Clifton, and G. Davies my residuary legatees.”

The testator died in November, 1815. He was, at his death, entitled to divers freehold and copyhold estates. The son, C. D. Hippuff, never recovered from his malady, and died in July, 1846.

This was a suit for the administration of the estate of the testator.

There were three questions discussed at the hearing of the cause. First, (as the second codicil, though unattested, would pass copyhold estates) whether the residuary legatees, Mr. Flint, M. W. Clifton, and G. Davies, were entitled to the surplus produce of the copyhold estates, or whether it went to the heir, as undisposed of; secondly, whether the trust for the accumulation of the rents between the death of the testator and the death of his son, came within the exception contained in the 2d section of the Thellusson Act, 40 Geo. 3, c. 98, as to portions; thirdly, whether, in the event of its being held that the trust for accumulation did not come within the 2d section of the

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Thellusson Act, that part of the accumulated fund which arose from the rents of the copyhold estates went to the residuary legatees.

The question as to the right of the residuary legatees to the surplus produce of the copyhold estates, was first argued.

Walker, E. F. Smith, Swanson, Webb, Wigram, Shebbeare, Malins, Briggs, Bacon, Little, Daniel, Beavan, Pownall, Elmsley, Jessel, Lewin, and J. H. Palmer, appeared for the different parties.

The following cases were cited: *Durour v. Motteux*, 1 Ves. sen., 320; *Kennell v. Abbott*, 4 Ves. 302; *Phillips v. Phillips*, 1 Myl. & K. 649; *Mallabar v. Mallabar*, Ca. t. Talb. 78; *Kellett v. Kellett*, 3 Dow. 248; *Arnold v. Arnold*, 2 Myl. & K. 365.

STUART, V. C. It has been said on behalf of the residuary legatees, that the resulting trust for the heir has been rebutted; that the words, "residuary legatees," are to be read "residuary devisees," and that, by this expression, the proceeds of copyholds, which are unquestionably real estate, pass to them. Now, both upon principle and authority, persons may, under the description of residuary legatees, be held to take an interest in real estate devised in trust for sale, if such an intention on the part of the testator can be gathered from the will. A legatee to be paid out of proceeds of real estate is, in fact, a devisee; for it is real estate at the death, and, if no trust be declared, it passes to the heir. Every legatee then named in the codicil is, in fact, a devisee, for every one of them would so take, and, therefore, there is as much difficulty as to each legatee as to the residuary legatees. If, in this codicil, he calls legatees persons who are to take a mixed fund arising partly from the sale of copyholds and partly from personal estate, how can I exclude from this fund persons who are called residuary legatees? In the previous part the testator, providing for a deficiency, says, that legatees are to become devisees, and I am bound by the context to hold that the residuary legatees, as much as the other legatees, are entitled to the fund arising from the produce of the copyholds.

The question as to the Thellusson Act was then argued.

The following cases were cited: *Longdon v. Simson*, 12 Ves. 295; *Beech v. Earl St. Vincent*, 19 Law J. Rep. (N. S.) Chanc. 130; *Jones v. Maggs*, 9 Hare, 605; s. c. 10 Eng. Rep. 159; *Lord Barrington v. Liddell*, ante, p. 1; *Middleton v. Losh*, 22 Law J. Rep. (N. S.) Chanc. 412; s. c. ante, p. 000.

STUART, V. C. It is said that the accumulations directed in this will are not within the act, but come within the exception in the 2d section. In this case the testator devoted the whole of his property, real and personal, for the benefit of his only son, who was afflicted with mental malady, and it was his wish that, if he should recover, he should be put in possession of the whole. It is out of the question that I can hold that any trust for accumulation directed for the benefit of a son of the testator, and applicable to the whole

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property, is within the exception of the 2d section. The 2d section applies only to raising portions, and the entirety cannot be a portion. However narrow a construction some of the cases have put on this section, I am sure I should extend its operation most unwarrantably if I should hold that the 2d section includes a trust such as this. I am, therefore, of opinion that the trust for accumulation is within the act.

I have then to consider what is to become of the income of the copyhold estates; the accumulation having exceeded for ten years the time limited by the act. It has been contended that, from the words of the will and of the statute, the residuary legatees are entitled to the income arising from the copyholds and personal estate, though not of the freeholds. Now, I must look to what the testator had said as to the enjoyment by the son and the residuary legatees. His intention was that if the son recovered he should take all. The statute alone raises the question. It is there said, that income, directed to be accumulated, shall go to, and be received by, such person or persons as would have been entitled if such accumulation had not been directed. If I could find that in the will the residuary legatees could take any thing during the life of this son, I might hold the legatees to be entitled; but, as I find that they are not entitled to any thing during the life of the son, I cannot adopt the view that, if during the life of the son the court had been applied to by the residuary legatees for the income during the excess, it would have given it to them. I, therefore, consider that it goes to those who would have been entitled, that is as to the copyholds, to the son, as his heir.

Another question arose in this cause as to a legacy given to one of the executors.

The testator had, by his will, appointed M. W. Clifton and G. Davies to be his executors. A codicil dated in November, 1815, was, in part, as follows:—"And I give unto John Hudson May the sum of 200*l.*, and I do hereby name John Hudson May joint executor, with M. W. Clifton and G. Davies; and in case my son should die in his present malady, then I bequeathe 200*l.* to the said John Hudson May." J. H. May did not prove the will.

The question was, whether the benefits to J. H. May, by the codicil, were forfeited.

The following cases were cited:—*Harrison v. Rowley*, 4 Ves. 216; *Stackpoole v. Howell*, 13 Ves. 417; *Read v. Devaynes*, 3 Bro. C. C. 95; *Cockerell v. Barber*, 2 Russ. 585; *Calvert v. Sebbon*, 4 Beav. 222.

STUART, V. C., said, that the general rule was, that where there was a legacy given to an executor, it was to be taken as annexed to the office, and was only to be paid to him on condition that he proved the will. The courts had, however, allowed very minute circumstances to take cases out of this rule. Here, there was this peculiarity—there was a legacy given to J. H. May in case the testator's son died in his present malady. To this he was at any rate entitled.

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Coventry had no power of appointment under the will of his father over any part of the 20,000*l.* bank annuities. The petitioners appealed from that decision.

Rolt, Elmsley, and E. L. Pemberton, for the petitioners. In case John married with consent, a settlement was to be made upon the marriage; and subject to the trusts of that settlement, John had a power of appointment over the whole fund. The next clause, "in case none shall be declared," both in grammatical construction and the scope of the will, is independent of marriage; and the true construction is, in case events shall happen in which none shall be declared, that is, either no settlement made on the marriage, or no marriage taking place; and the subsequent gift over of the 10,000*l.* confirms this view, and must be read, "if my son dies unmarried and without having exercised the power, or, having been married, without leaving issue, and without having exercised the power," then the trustees are to hold the 10,000*l.* upon the trusts mentioned. If John had married with consent, the directions for a settlement are imperative. *Brown v. Higgs*, 8 Ves. 570. If the construction of the Master of the Rolls is right, then the testator, contrary to his expressed intention, has made a smaller provision for John than for his other younger children.

Bethell and W. M. James, for the residuary legatees. The testator contemplates, first, a marriage with consent; and secondly, a marriage without consent, in which case there would be no settlement; and then, in case his son dies unmarried, he gives half the fund over, and leaves the other half to fall into the residue.

[LORD CRANWORTH, L. J. Suppose the son had married without consent, and had issue?]

John would then have had no power of disposing of any part of the fund.

Follett and Osborne, for other parties, in support of the decision below.

Rolt replied.

THE LORD CHANCELLOR. In this case it is very clear, that the testator intended, as regards the 20,000*l.*, to make it a portion for his son John, with certain checks and provisions, as one may assume, in consequence of the want of providence in that person. He gives him a life-interest, but declares that he shall not have power to anticipate. With the same view, he makes provision as regards his marriage, having made no absolute gift of the fund after the death of John. The provision was this: "Provided also that in case my said son shall at any time hereafter marry with the consent of my said trustees, &c., then I direct that the said last-mentioned sum of 20,000*l.* bank annuities (subject nevertheless to the life-interest of my said son, of and in the dividends, interest and yearly produce thereof) shall be settled

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for the benefit of any woman with whom my said son shall or may intermarry, and the issue of such marriage in such manner as shall be agreed upon with the concurrence of my said trustees or trustee for the time being." Now, stopping there, there is nothing further provided for than a marriage with consent, and a direction that thereupon the property should be settled as might be agreed upon. Then comes a sentence, which in a great measure must be read as an independent sentence: "And subject to the trusts to be declared in any settlement to be made on the marriage of my said son, or in case none shall be declared, then I direct that the same bank annuities shall go unto such person or persons, &c., as my said son shall by his last will appoint." This is in substance, "If you marry with consent, a certain settlement shall be executed; subject to the trusts of such settlement, or in case none shall be declared, then you shall have the power of appointing the fund by your will." He intended to put a bridle upon his son to prevent anticipation, and further he did not intend that any woman whom his son might marry should enjoy the property unless his trustees concurred; but he meant that the issue should take, and, subject thereto, that his son's power of disposition over the fund should remain. And though introducing so much of the context, as Mr. Bethell suggests, would meet the view of the respondents, yet if you are not to take the entire context, you must introduce words in every clause to explain the meaning; but taking the entire context, you need not introduce any particular words. For instance, in the clause, "In case none shall be declared," you must introduce the words, "upon such marriage." So, when you come to the gift over, "In case my said son shall die unmarried, or having been married, without leaving issue," you must introduce the words "with such consent as aforesaid," otherwise the case provided for will not at all come into harmony with the limitations in the supposed settlement; for it is an absolute limitation over in case he died, having married, (saying nothing of consent) without leaving issue, meaning issue living at his death; whereas the settlement would have provided for issue which had died in his lifetime; so that you must take the whole context to bring it into a regular course of settlement, and to explain the intention.

If the whole context is taken, I see no difficulty. "If my son marries with consent, let there be a settlement, and subject to the trusts of that settlement, whatever they may be, my son shall have a power of appointment by will." But it is not only subject to the trusts, but "subject to the trusts to be declared of and concerning the bank annuities in any settlement to be made on the marriage of my son." If it had stopped there, would not that be a gift over in any event? In either case he would have had a power of appointment by will; so that he would have taken the property without violence to the will, which provided what was to be done if he married with consent, but did not provide for the wife or the issue, if he married without consent. What I conceive the testator intended was, that, in case he married without consent, the provision for his wife and the issue of the marriage, should depend on his testamentary disposition; and, if

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he married with consent, and the trusts failed, the fund should still be subject to his disposition. The words, "in case none shall be declared," make it very difficult to say that there was an absolute trust declared to make a settlement, because, though the first words seem to make it imperative, these latter words imply an option in the party, and so substitute his will in the place of the direction. For the trustees might have consented to a marriage with the proper person, but not have concurred in a settlement; and the word, "none," refers to the trusts of the settlement. Then, if he married with consent, he was to have the power of appointment. It was asked by one of the lords justices, what would have been the case if he had married without consent and left issue? According to the respondents' argument, the answer to that must be, that the issue would not have been entitled; that the son would have had no power to provide for such issue out of the fund. When the testator speaks of providing a larger portion for this his favorite son, could it be his intention to cut him down to a life-interest and to leave his family destitute? It is perfectly clear that such was not his intention, but that he intended, in all events, to give him a testamentary power over the fund. The words, "in case none shall be declared," may apply as well to an absence of any declaration of trusts as to a defective declaration. How is this then assisted by the following proviso? "Provided, also, that in case my said son shall die unmarried, or having been married, without leaving issue, and without having exercised the power of appointment I have hereby given to him," he directs his trustees to stand possessed of the 10,000*l.* for the other younger children. If you read this as an independent sentence, and read the rest as alternative, but not altogether unconnected with it, it is very difficult to explain the will, and to say what is the meaning of the words "without having been married;" but if we admit the construction of those who claim over, then we must take the whole context as bearing on each particular disposition. Where is the difficulty? In *Wilson v. Eden*, yesterday, in the House of Lords, there was a clause of this sort:—after a limitation to the daughter for life, with remainder to her issue in tail; "and in case my daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled by the true meaning of this my will, then, and in either of those cases, I devise all my said real estates to my granddaughters, living at my daughter's death." It had been decided in the Court of Exchequer (1 Exch. Rep. 772; s. c. 18 Law J. Rep. (N. S.) Exch. 221,) that there the whole sentence applied to the second alternative. The Court of Queen's Bench (19 Law J. Rep. (N. S.) Q. B. 104) held that you could not import the words, and they read the second clause as an independent clause, and so the gift over took effect. The House of Lords came to a conclusion, as to the construction, in accordance with the Court of Exchequer, and considered that the whole of the clause governed both events, and that therefore it was really the same as if the words "or no such issue male as shall be entitled under this my will," had been specified in the first part. Now, that construction would enable this court, upon the context of this will, to read this clause in this

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way: — "Provided also, and my will is, that in case my son shall die unmarried, or having married, without leaving issue, and without having exercised the power of appointment, I give 10,000*l.* over." That makes the will sensible, and shows that in the previous part of it, he meant to give him a power of appointment. The first part is a gift over of a power to the son in all events, and this construction makes the subsequent part exactly harmonize with that. "In case my son dies unmarried, or having married, without leaving issue, and not having exercised the power," (the power as I have shown arising in each case,) "then this 10,000*l.* shall go over." I do not understand why he exercised his power only as to 10,000*l.*, but I suppose it was considered that a gift arose to him, by way of implication, of the 10,000*l.*, and the remainder was given over. There is nothing, however, in the will to justify such a construction. With the greatest deference to the learned judge below, the conclusion I have come to is satisfactory to my own mind, and I have the concurrence therein of my lords justices; and in arriving at that conclusion, it is satisfactory to know that we are thereby executing the manifest intention of the testator. The order, therefore, will be reversed; and there will be a declaration that in the events which have happened, John had a sufficient power to dispose of the fund, and that it was well disposed of by his will.

FOLIGNO v. MARTIN.¹

November 5 and 8; December 2, 1852.

Contract — Principal and Agent — Deed — Recital — Evidence.

R., after some negotiations, contracted with the assignees of Messrs. E., for the purchase of certain claims of the bankrupts against the estate of G. F. B. He represented that he acted on behalf of himself and M., who was clearly cognizant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. and M. This was submitted to M., who approved of it; and at that time, he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase:—

Held, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognize it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M., with costs; but as R. admitted the plaintiff's case, a decree was made against him without costs.

THIS suit was instituted by Isaac Foligno, Zadok Aaron Jessel, William Quilter, and Edward Edwards, the assignees of Messrs. Emanuel, Brothers, for the specific performance of a contract alleged

¹ 22 Law J. Rep. (N. S.) Chanc. 502.

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to have been entered into with them by the defendants, Charles Martin and Samuel Sextus Ritchie, for the purchase of certain claims which the bankrupts were entitled to sustain against the estate of George Frederick Blogg, deceased.

In the years 1844 and 1845, before the bankruptcy of Messrs. Emanuel, Brothers, three acceptances, amounting together to 7,480*l.*, were given by the bankrupts for the benefit of the firm of Blogg & Co. The first of these acceptances, amounting to 2,640*l.*, was paid by the bankrupts at maturity, before their bankruptcy. In 1846, George Frederick Blogg died. His widow, Frances Catherine Blogg, obtained letters of administration of his estate, and C. Martin was her surety in the administration bond then entered into. In January, 1846, Messrs. Emanuel, Brothers, became bankrupt, and shortly afterwards, the two remaining bills for 2,000*l.* and 2,840*l.* having become due, were presented for payment, and dishonored, and the amount proved against the estate of the bankrupts. In March, 1847, the present plaintiffs filed a bill on behalf of themselves and the other creditors of George Frederick Blogg, for the administration of his estate and the repayment of the sums paid by the bankrupts, and for indemnity against the outstanding liabilities. The defendants to that suit were Mrs. Blogg, his administratrix, Lyon Samuel, his surviving partner, and Charles Martin, the defendant to this suit. In February, 1849, a decree was made in that suit which contained directions to the Master to make certain special inquiries; in other respects, it was the usual administration decree. Under it, on the 22d of February, 1851, a receiver of the outstanding estate of George Frederick Blogg was appointed. After various communications respecting a compromise, Mr. Cole, the solicitor of the assignees, returned a memorandum, in writing, of the proposed heads which had been altered by him, to this effect:—"The plaintiffs (the assignees of Emanuel, Brothers,) agree to sell to Mr. Ritchie, of Houndsditch, who agrees to purchase the debt due to them from the estate of George Blogg, deceased, as a member of the firm of Blogg, Samuel & Emanuel, and sought to be enforced by these suits, and all their claims of every description upon the estate, in consideration of 1,500*l.*, to be paid by Mr. Ritchie to the assignees, and the further sum of 150*l.* to be paid by Mr. Ritchie, in respect of the plaintiffs' costs of the suit of *Foligno v. Blogg*, incurred between the 12th of March, 1849, and the 13th of December, 1850, such two sums of 1,500*l.* and 150*l.*, making together 1,650*l.* An assignment is to be forthwith prepared and executed from the plaintiffs (the assignees) to Mr. Ritchie, of the debt and claims agreed to be sold to him by the preceding article, such assignment to be prepared by and at the expense of Mr. Ritchie, and the form thereof respectively to be settled by Mr. Selwyn and Mr. H. Cole, in case of the parties differing about the same. No further proceedings are to be taken in the suit by the receiver or by any other party, except for giving effect to the present agreement, and the plaintiffs bear their own costs incurred to this time up to the completion of the present purchase. If any creditor of the said George Blogg, other than the plaintiffs, should take any proceedings in this suit, with a view to

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enforce any debt or debts due to such creditors, then Mr. Ritchie is to be at liberty to prove the debt and claims hereby agreed to be purchased by him, and to carry on and prosecute such proofs in the names of the plaintiffs, in such sort, way, and manner, and so that he, Mr. Ritchie, may have the full benefit thereof; and the plaintiffs are to render every assistance to Mr. Ritchie in so doing. But, nevertheless, Mr. Ritchie is to indemnify the plaintiffs from all costs and expenses to be occasioned by his carrying on and prosecuting such proof in their name."

The plaintiffs said that Mr. Ritchie entered into this agreement on behalf of himself and C. Martin; and that if C. Martin did not sanction it beforehand, he subsequently recognized and adopted S. S. Ritchie as his agent, and ratified and adopted the agreement; and that such agreement was recited in a deed of assignment, afterwards prepared and engrossed. Charles Martin denied that S. S. Ritchie had any authority from him to enter into any such agreement; and he denied that he subsequently adopted or confirmed that or any other agreement. The facts relied upon by the plaintiffs, were, that in the years 1849 and 1850, C. Martin proposed to the assignees a compromise of the suit of *Foligno v. Blogg*, and for that purpose to purchase their claim in that suit for 1,200*l.*, to be paid by four acceptances of 300*l.* each, at three, six, nine, and twelve months' date. This proposal the assignees rejected, being resolved not to enter into any agreement for the sale of their claim, except for ready money. Several communications and negotiations took place between Mr. Martin and his solicitor, on the one side, and Mr. Cole, the solicitor of the assignees, on the other. Messrs. Stevens & Satchell, throughout the transactions in question in this suit, were the solicitors of Messrs. Ritchie and Martin. These negotiations on the part of C. Martin ended in nothing. On the 24th of December, 1850, Messrs. Stevens & Satchell wrote a letter to S. S. Ritchie to this effect:—"Herewith we send you a sketch of heads of compromise. Perhaps it may be as well we should consider it together, before you show it to Mr. Quilter. We also send draft heads of a partnership deed for you, in which we have assumed that you will be paid a premium."

In January, 1851, Mr. Ritchie himself, for the first time, made proposals for a compromise to Mr. Cole, who acted on behalf of the assignees. In the same month, the written paper, containing the heads of a proposal to purchase this claim, was sent to Mr. Cole by the solicitor of the defendant, and Mr. Cole, in his evidence, expressly stated that S. S. Ritchie said that he acted on behalf of C. Martin as well as himself, which statement Mr. Cole believed to be correct. In the meantime, the matter being delayed, Mr. Cole resolved to prosecute the suit and to take out a warrant to proceed before the Master. In consequence of this, Ritchie wrote to Mr. Cole a letter of the 18th of February, 1851, which confirmed his evidence, and was to this effect: "I have so far arranged the compromise between C. Martin and myself, that he has agreed to pay the money, namely, 1,500*l.* in cash, and 150*l.* for your costs, as soon as the form of compromise is agreed to. He is to see Mr. Satchell about that immedi-

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ately, and no doubt the whole affair will be settled this week." Thereupon Mr. Cole suspended the proceedings in the suit. On the 22d of February, 1851, he returned the memorandum of agreement, altered in the form already stated, to Messrs. Stevens & Satchell. On the 10th of April, 1851, Messrs. Stevens & Satchell sent to Mr. Cole the draft of the proposed assignment, and some complaint being made by them about the delay in receiving the engrossment, on the 1st of May, 1851, Messrs. Stevens & Satchell wrote to Mr. Cole a letter to this effect:—"Foligno v. Blogg. The reason why you have not received the engrossment (which is nearly ready) is, that Mr. Martin wished to have the draft to look over, and has not yet returned it to us; but we trust to have it back to-morrow. We have called several times without finding him at home." And on the following day the engrossment was sent by them to Mr. Cole. It was duly executed by the plaintiffs, and was retained by Mr. Cole only till the money should be paid. The assignment so prepared recited the history of the liability incurred by the bankrupts, and of the suit of *Foligno v. Blogg*, and the proceedings in it, and it then contained this recital:—"Whereas Charles Martin and Samuel Sextus Ritchie have agreed with Isaac Foligno, Zadok Aaron Jessel, William Quilter, and Edward Edwards, for the absolute purchase of the several debts or sums of money hereinbefore mentioned, and all interest thereon, and all sums of money now due or payable, or hereafter to become due or payable, to Isaac Foligno, Zadok Aaron Jessel, William Quilter, and Edward Edwards, on account of the costs of the suits, or either of them, and all other, if any, the claims and demands of Isaac Foligno, Zadok Aaron Jessel, William Quilter, and Edward Edwards, upon the estate of George Frederick Blogg, or Frances Catherine Blogg, or the copartnership firms of Blogg & Martin, and Blogg & Co., or either of such firms, or any partner or partners for either of such firms; and it has been agreed that the consideration for such purchase shall be the sum of 1,500*l.*, to be paid by Charles Martin and Samuel Sextus Ritchie into the Bank of England, in the name and with the privity of the Accountant of the Court of Bankruptcy, to the credit of the estate of Michael Emanuel and Henry Emanuel, bankrupts, and the further sum of 150*l.* to be paid by Charles Martin and Samuel Sextus Ritchie to Messrs. John and Charles Nicholas Cole, the solicitors for the assignees of Michael Emanuel and Henry Emanuel, in respect of certain costs incurred by the plaintiffs in the second suit of *Foligno v. Blogg*, between the 12th of March, 1849, and the 13th of December, 1850, such sums of 1,500*l.* and 150*l.*, making together the sum of 1,650*l.*; and upon the treaty for such purchase, it was agreed that the several parties thereto should respectively enter into the covenants hereinafter contained."

The deed then contained the usual operative part, by which the assignees conveyed all the principal sums claimed to be owing to them, and all interest to accrue due thereon, and all the sums of money then or thereafter payable to the plaintiffs, or on account of the costs of the suit, and all other claims and dividends whatsoever,

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of the plaintiffs or of the bankrupts, in respect of the bills of exchange against the estate and effects of George Frederick Blogg, deceased, or Frances C. Blogg, or the copartnership firms of Blogg & Martin, and Blogg & Co., and all their right, title, and interest in respect of the premises; and the deed created C. Martin and S. S. Ritchie the attorneys of the plaintiffs for those purposes; and the deed also contained a covenant by C. Martin to indemnify the plaintiffs against any costs to be incurred in the further prosecution of the suit.

S. S. Ritchie admitted the contract, and his liability to complete it.

Charles Martin denied that he entered into any contract whatever; but if the court should be against him on that point, he submitted that the contract was such that this court would not decree a specific performance of it; and he objected also, on the ground of champerty, and contended that the agreement, of which the plaintiffs sought the specific performance, was a contract to purchase a suit.

R. Palmer and Cole, for the plaintiffs, Isaac Foligno, Zadok Aaron Jessel, William Quilter, and Edward Edwards. As to specific performance — *Adderley v. Dixon*, 1 Sim. & S. 607; *Webb v. The Direct London and Portsmouth Railway Company*, 1 De Gex, M. & G. 528; s. c. 9 Eng. Rep. 249; *Stuart v. The London and North-Western Railway Company*, 21 Law J. Rep. (N. S.) Chanc. 450; s. c. 11 Eng. Rep. 112.

As to maintenance — *Hartley v. Russell*, 2 Sim. & S. 244; *Hunter v. Daniel*, 4 Hare, 420; *Harrington v. Long*, 2 Myl. & K. 591.

Roupell and Selwyn, for Charles Martin.

Hardy, for Samuel Sextus Ritchie.

THE MASTER OF THE ROLLS. The agreement, which is recited in the deed, is, in fact, the agreement of which this bill prays specific performance. The draft of this deed, previous to its being engrossed, was submitted to Charles Martin, and was approved by him. This conclusively shows, whatever may be the value of the fact, that, at that time, at least, C. Martin was willing to execute that deed, and to enter into the covenants there expressed. The events which occurred subsequently to the transmission of the engrossment by Messrs. Stevens & Satchell to the assignees are not material to be referred to. They consist principally of applications on the part of the assignees to have the money paid and the matter completed: these are met by excuses and delays, and finally by a refusal to complete the contract. They throw little light upon the previous transactions, although they may to some extent explain why Mr. Martin had changed his mind, and become unwilling to enter into the engagements which he was shortly before willing to perform.

The questions I have to decide are, whether the circumstances establish the fact that C. Martin has entered into any contract; and if they do, whether this court will enforce the specific performance of it.

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For the purpose of determining the first question, it is material to consider which is the contract to be specifically performed. Is it the agreement stated in the memorandum of the 22d of February, 1851; or, if they are not identical, is it the agreement recited in the deed of assignment of the May following? The evidence does not satisfy me that C. Martin either authorized S. S. Ritchie to enter into the agreement of the 22d of February, 1851, on his behalf, or that he afterwards ratified or adopted it, unless his conduct respecting the deed of May, 1851, has that effect. It is no doubt proved that S. S. Ritchie told Mr. Cole that he did enter into that agreement on behalf of himself and Martin, and that Mr. Cole believed that statement to be correct; but that alone will not establish the truth of Mr. Ritchie's assertion. The only facts to support that are, that when the draft of the deed was prepared, it was submitted to C. Martin, and was perused and approved by him. This deed, however, contains no statement or recital that S. S. Ritchie had entered into the agreement of February, 1851, on behalf of himself and C. Martin; if it had contained such a statement, which had been acceded to by C. Martin, it might have gone far to confirm the statements made by S. S. Ritchie when he entered into that agreement; the recital is not that S. S. Ritchie, on behalf of C. Martin, had agreed, but that both had agreed to the purchase on the terms after mentioned. This is a common recital in cases where the deed itself is, and is intended to be, the only binding document between the parties; and, if that be the true explanation of this recital, until the deed was executed, it will have no effect in binding the defendant, C. Martin, although it be true that he was, in April and May, 1851, willing to enter into such an agreement as is contained in that deed. The account which Mr. Satchell, the solicitor of C. Martin, gives of the transaction is to this effect: "During the year 1850 I acted as the solicitor and professional adviser of both the defendants. In or about the month of December in that year a negotiation or treaty was opened by S. S. Ritchie, for the purchase of the claims and demands of the plaintiffs, which formed the subject of a suit of *Foligno v. Blogg*. Such negotiation or treaty was opened and carried on by Samuel S. Ritchie in his own name and on his own behalf, and by William Quilter, on behalf of the assignees, together with their solicitor, Mr. C. N. Cole. Subsequently thereto, and about the end of March in the year 1851, an agreement was entered into by Samuel S. Ritchie, for such purchase. The terms of such agreement were reduced into writing by me on his behalf and as his solicitor. The first draft was prepared by me on the 24th of December, 1850. It was entitled, '*Foligno v. Blogg*,— Heads of proposed compromise.' In so doing I acted on the instructions of Samuel S. Ritchie; and after I had prepared the draft-agreement, I forwarded a fair copy to Samuel S. Ritchie, and had several interviews with him, at one of which he requested that some alterations might be made. This was accordingly done, and a fair copy of the agreement, as altered, was given by me to Samuel S. Ritchie, about the 28th of December, 1850. Charles Martin was not a party to, or in any way concerned or interested in, the negotiation or treaty, and he did not, nor (so far as I know or

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have any reason to believe) did any person or persons, by his direction, or acting under his instructions, have any communication relative to the purchase with the plaintiffs, or any or either of them, or with any person or persons acting on their or either of their behalf, nor was the agreement signed by C. Martin, or by any person lawfully authorized thereunto by him." In a subsequent part of his evidence he says, C. Martin "was made a party and his name inserted in the deed of assignment under the following circumstances, namely, after he had agreed to advance part of the purchase-money, as just mentioned, and before the deed of assignment had been prepared, several interviews took place in my presence between S. S. Ritchie and C. Martin, to consider in what way and on what terms the claims and demands should be held by S. S. Ritchie. At one of these interviews, C. Martin expressed a desire that the said claims and demands should be assigned to S. S. Ritchie, in such a manner that he might not be able to deal with the same without C. Martin's sanction, because they included the right of suing Stephen Goldner, then resident in Moldavia, for sums of money amounting to several thousands of pounds, owing by him to the estate of G. F. Blogg; and C. Martin was desirous that this debt should neither be released on the one hand nor imprudently enforced on the other, but should be dealt with in such way as might be most for the benefit and protection of Mrs. F. C. Blogg and her infant children. S. S. Ritchie objected to his being restrained in the manner proposed by Charles Martin, and wished to have the claims and demands assigned to himself without any trust or restriction being imposed upon him, but C. Martin would not agree to this, and the discussion terminated without any agreement being come to between Charles Martin and Samuel S. Ritchie, and under the understanding that the subject was to undergo further consideration. In the course of a day or two after the last of these interviews, S. S. Ritchie called upon me and stated that he wished to complete his purchase of the claims and demands, and as he and C. Martin could not at present agree as to the power that he, S. S. Ritchie, was to have over the claims and demands, he thought it would be better to let the same be assigned unto himself and C. Martin jointly, as a temporary measure, until the question under consideration at their recent interviews could be settled. S. S. Ritchie accordingly instructed me to have the assignment prepared in the joint names of Charles Martin and himself, and the assignment was prepared in that manner, and sent to C. N. Cole for perusal, on behalf of the plaintiffs, before Charles Martin saw the draft, or (so far as I know or believe) knew that his name was inserted therein." Then there is another statement, which I do not think it material to read, with respect to Mr. Martin's intentions. I cannot, upon this evidence, come to the conclusion that C. Martin authorized S. S. Ritchie to conclude any agreement for him; neither can the approval by C. Martin of the draft of the deed amount to a sanction of the agreement entered into by S. S. Ritchie originally. That which S. S. Ritchie said he was proposing, on behalf of Martin and himself, was the memorandum of agreement, which was afterwards altered into the memorandum of February, 1851. By this first

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memorandum, the payments were to be made by two acceptances of C. Martin and two of S. Goldner. This was altered by the assignees, who refused to take any thing but money. There is no evidence to show that the defendant C. Martin saw and approved of this alteration, even though it should be believed that he authorized S. S. Ritchie to open the negotiation as proposed. The agreement introduced in the deed of May, 1851, is a different and distinct agreement from that which the defendant S. S. Ritchie told Mr. Cole he was authorized to make on behalf of C. Martin and himself. I am of opinion, therefore, that the defendant C. Martin is not shown to have entered into, either by himself or his agent, the agreement mentioned in the memorandum of February, 1851.

What evidence then is there of C. Martin having entered into the agreement stated in the deed of May, 1851? That he was willing or desirous to enter into such an agreement is clear; that he did so is not supported by any evidence. It is obvious that the deed, standing by itself, and the fact connected with it, namely, the settling the draft, containing this recital, cannot have this effect. If it were held to do so, it would be to give the same effect in equity to the settling and approving of the draft of a deed as that which would arise from the actual execution of it, except so far as any question might arise on the Statute of Frauds. A man may, however, be willing to enter into a purchase, and even settle the terms of the deed by which it shall be effected, without entering into a contract to that effect, and he will not be bound to complete the purchase if he have not executed the deed, or done any act, other than that of settling the draft, which can be construed into entering into such a contract.

The recital in the deed was either the mere formal recital that the parties to a deed had agreed to do what was therein expressed, or it was the recital of some previous act done before the draft was prepared; if it were the former, it needs nothing more than that the parties to the deed do thereby agree to do that which is therein expressed, and it binds no one till the deed be actually executed. If this recital was something more, and referred to some previous agreement, it must have referred either to the agreement mentioned in the memorandum of February, 1851, or to some other agreement. I have already stated that if it were intended to refer to the agreement mentioned in the memorandum of February, 1851, it was inaccurate: that it did not accurately describe it, and that it would be a violation of language to say that it can be treated as any admission by C. Martin, that S. S. Ritchie had authority to enter into a contract on his behalf. If it were intended to refer to any agreement other than that of February, 1851, there is no evidence in the cause respecting, or even in allusion to, any other agreement between the defendant C. Martin and the assignees in the whole transaction.

I must also observe that there are various circumstances which support the view of the case put forth by C. Martin in his answer, and supported by the evidence of his solicitor, Mr. Satchell. In the first place, though Mr. Cole says that S. S. Ritchie assured him he had Mr. Martin's authority to enter into the contract, he admits Mr.

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Ritchie stated that part of the money was to be obtained from C. Martin, and part from other persons: this strongly supports the case that though C. Martin was to find the money, which was to be secured to him by the deed, he was not a party to the contract; it is one thing to lend a man money to enable him to enter into a treaty for a purchase, and another and a different thing to enter into a contract for the purchase itself. In addition to this, it is to be observed that when Mr. Cole alters the memorandum of agreement, he does not do so to make it either a contract by C. Martin personally, or by S. S. Ritchie on behalf of himself and C. Martin.

I am of opinion, therefore, that the plaintiffs have failed in making out that C. Martin entered into any agreement, either by his agent or by himself personally, to the effect insisted upon by the bill. It becomes unnecessary, therefore, to consider the ulterior points; and as the case against C. Martin fails, the bill must be dismissed, as against him, with costs; but the plaintiffs are, I think, entitled to a decree against S. S. Ritchie, who admits their case, but without costs, as he seems never to have disputed that right on behalf of the plaintiffs.

*Ex parte WOOLMER, In re THE DIRECT EXETER, PLYMOUTH AND DEVONPORT RAILWAY COMPANY.*¹

January 27, 1853.

Company — Winding-up Acts — Official Manager — Appeal from the Master — Costs.

Proceedings were taken in the Master's office by the official manager, upon which he obtained the order of the Master for the production of an account of certain payments. The parties ordered to produce this account appealed, and the court discharged the order: —

Held, that the proceedings being, in the opinion of the Court of Appeal, improper, the official manager must pay the costs before the Master, but that the costs of supporting the order of the Master, in the Court of Appeal, must be paid out of the estate; the former being without prejudice to any order the Master might make as to indemnity out of the estate.

In this case the official manager applied to the Master charged with the winding up of the affairs of the above-named company, for an order directing Messrs. Woolmer, Bastard & Kingdon to produce before him a statement in writing, of the application of a certain sum paid to them by Mr. Tanner, which had been already allowed as an item in their accounts by the Master. The order was dated the 29th of November, 1852, and these three gentlemen now appealed, pray-

¹ 22 Law J. Rep. (N. S.) Chanc. 513.

Ex parte Woolmer; In re The Direct Exeter, &c. Railway Company.

ing a discharge of the order. After argument, the court was of opinion that the order ought not to have been made, and ought to be discharged; which was directed accordingly.

Follett and J. V. Prior, for the appellants, asked that the official manager might be ordered to pay the costs.

Roxburgh, for the official manager. The officer appointed to proceed in the Master's office has done no more than his duty in bringing before the Master an item of account with which he was not satisfied. So proper did this appear, that the Master actually made the order, and until this court has decided, as it has done, that the Master was wrong, the official manager's duty was to support the view thus taken. The Master, having made the order, shows that the official manager ought to have his costs before that functionary; and an appeal having been presented, it was clearly his, the official manager's, duty to come here and support the Master's order. The hardship on an official manager, in being visited personally with costs, would be extreme, and has never been inflicted.

[TURNER, L. J. I directed Mr. Turquand to pay costs personally in *The Grand Trunk Railway case*,¹ because the suit there was improper, and although he also had the sanction of the Master.]

The 59th, 96th, and 103d sections of the Winding-up Act of 1848, (11 & 12 Vict. c. 45,) and the 12th section of that of 1849 (12 & 13 Vict. c. 108,) show that the official manager is not to be liable to costs; and so Lord Cottenham held in *Ex parte Marsh, in re the Cambridge and Colchester Railway Company*, 1 Mac. & G. 302; s. c. 1 Hall & Tw. 578.

KNIGHT BRUCE, L. J. We do not mean, in this case, to impute blame to the official manager, but the argument used in the behalf goes to the length of contending that, however oppressive or vexatious his proceedings may have been, he is not to be liable for costs. I can give no further attention to this argument than merely listening to it, for I cannot go with it. He has instituted proceedings before the Master, which we think he ought not, and that he ought to pay the costs; and this we order him to do. We do not, however, prejudice any thing which the Master may direct us to his being indemnified out of the estate. I was disposed to deal in the same way with the costs here; but my learned brother thinks that would be a hardship, and I defer to his opinion, and direct that these costs be paid out of the estate.

TURNER, L. J. I do not impute any blame to the official manager, further, at least, than this — that he has not exercised a discretion I think he was bound to do. There was no ground for the proceedings before the Master; and, although he obtained an order from the Mas-

¹ See this case reported both below and on appeal, *post*, p. 514.

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ter, if he had exercised his discretion he would not have applied for it. I think he must pay the costs incurred in the Master's office; but having got an order, although indiscreetly, it would perhaps be hard upon him to make him pay the costs of having to come here to defend it; and, therefore, I think he must have his costs before this court out of the estate.

EDWARDS v. TUCK.¹

March 10, 1853.

Will — Accumulation — Thellusson Act.

A testator, after disposing of parts of his real and personal estate for the benefit of his granddaughter, F. E., for life, and after her death for her children at twenty-one, gave all the residue of his real and personal estate to trustees, upon trust to accumulate the income and transfer one moiety of the corpus and accumulations to the children of F. E., and the other moiety to the children of his nephew, C. W. C., such shares to be transferred to them at their respective ages of twenty-one years. The twenty-one years after the testator's death expired in 1847. Upon a bill filed by F. E., who never had any children:—

Held, that the direction to accumulate beyond the twenty-one years from the testator's death was void under the Thellusson Act: that such accumulations were not within the 2d section of the act; that they were undisposed of; and that, at the expiration of the twenty-one years, the income of the real estate belonged to the testator's heir at law, and the income of the personalty to the testator's next of kin.

WILLIAM CHAPMAN, by his will, dated the 21st of October, 1826, gave certain parts of his real and personal estate, none of which was comprised in the residue, to George Priest, William Tuck, and George Yeatherd, upon trust for his granddaughter, Frances Edwards, the plaintiff, during her life, and after her death for her children, who should attain the age of twenty-one years, with remainder in default, upon trust, for the children of his nephew, Charles William Chapman, in like manner as he had thereafter bequeathed to them a moiety of his estate and effects.

The testator then declared that it should be lawful for his trustees either to let or sell all or any part of the freehold, copyhold, or leasehold estates, and as to the residue or surplus of the rents, issues and profits, of his freehold, copyhold, and leasehold estates, and of the moneys to arise from the sale of such parts thereof as should be sold as thereinbefore directed, and of his personal estate and effects, and the produce thereof from time to time remaining over and above what should be sufficient to answer the several purposes thereinbefore mentioned, his will was, that his trustees should from time to time permit and suffer the same to accumulate for the benefit of the several persons to and in trust for whom the said estates and premises were thereafter devised and bequeathed, and should for that purpose lay

¹ 22 Law J. Rep. (N. S.) Chanc. 523; 17 Jur. 311.

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out and invest the same from time to time as and when the same should be received, in the joint names of the said trustees, in some of the public stock or funds, or in government or real securities in England, and should from time to time receive and take the dividends, interest and annual profits thereof, and again place out and invest the same in such or the like stocks, funds and securities, and so from time to time as occasion should be, or require, until the period of distribution hereinafter mentioned and expressed. And, subject to the several trusts aforesaid, he directed the trustees to stand seised and possessed of his freehold, copyhold, and leasehold estates, and of the moneys to arise and be received from the sale of such parts thereof as should be sold under the aforesaid trusts, and of his personal estate and effects, and the produce thereof, and of all accumulations of his real and personal estate and effects, and the rents and issues, dividends and profits thereof, and all other his estate and effects whatsoever, the whole of which he directed should for the purpose of distribution be considered as personal estate, in trust to divide the same into two equal half parts or shares, and to pay or transfer one of such half parts or shares unto and amongst all and every the child or children of his granddaughter, Frances Edwards, the plaintiff, and their respective executors, administrators, and assigns, in equal shares as tenants in common; and if but one child, the whole to such one, his or her executors, administrators or assigns, and also to pay or transfer the remaining half part or share thereof unto and amongst all and every the child or children of his nephew, C. W. Chapman, and their respective executors, administrators and assigns, in equal shares, as tenants in common, and if but one, the whole to such one, his or her executors, administrators or assigns, the share of each child of his granddaughter, and of his nephew, who should be a son, to be conveyed, paid or transferred to him at his age of twenty-one years, or to his heirs, executors or administrators if he should die under the age of twenty-one years, leaving issue, and the share of such child, being a daughter, to be conveyed, paid and transferred to her at her age of twenty-one years, or day of marriage, whichever should first happen, in case such ages or days should not arrive in his lifetime, but if such ages or days should arrive in his lifetime then as soon as conveniently might be after his decease, with the accumulated rents, interests, dividends and profits thereof from the time of his decease; and he further declared, that all and every the share and shares thereinbefore by him provided for the children of his nephew, C. W. Chapman, and of his granddaughter, Frances Edwards, respectively, should be considered as vested interests in such of them who, being a son or sons, should live to attain the age of twenty-one years, or die before that age, leaving issue, and being a daughter or daughters, should live to attain that age or be married. And he further declared, that if any such child or children should depart this life without having attained a vested interest in his or her share of the trust estate and premises, the share of every such child so dying should accrue and belong unto the survivors or survivor of the said children, and the heirs, executors or administrators of such survivors, if more than one, in equal shares,

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and should become vested and be conveyed, paid or transferred at such ages or times and in such manner as before directed concerning his, her or their original shares or share respectively, and also that all and every the share and shares which by virtue of the proviso should accrue to any such surviving child in case any such surviving child should depart this life without having attained a vested interest in his or her accruing share or shares should from time to time be subject to such and the like right of accruer or survivorship unto and for the benefit of the survivors or survivor of the said children as before declared concerning the original share or shares of such child or children so dying as aforesaid. And he further declared, that in case there should not be any children or child of the said C. W. Chapman, and of his said granddaughter, Frances Edwards, or of either of them, or being such if all such children should depart this life without having attained any vested estate and interest in his trust estate and premises or any part thereof, then and in such case his trustees should stand seised and possessed of and interested in his real and personal estate and effects, or so much thereof as should not have been applied for the purposes aforesaid, in trust for his own right heirs and next of kin according to the respective natures and qualities thereof.

The testator died on the 19th of November, 1826, and his will was proved, by George Priest and William Tuck, on the 6th of December, 1826. Parts of the real estates were sold, and the personal estate was got in, and the income of the residue arising from both was accumulated according to the trusts of the will. Upon the expiration of the term of twenty-one years from the testator's death the trustees found it impossible to carry on the trusts, and the result was that this bill was filed by Frances Edwards. Upon a reference to the Master, he found that Charles Thomas Edwards, and the plaintiff Frances Edwards, who was born on the 1st of January, 1799, and was still unmarried, and Thomas Edwards, were the sole next of kin of the testator, living at the time of his death, that they were all then living, and that Charles Thomas Edwards, was his heir at law.

The Master also found that Charles William Chapman intermarried with Louisa Browell on the 10th of September, 1810, and died in September, 1836, having had nine children, and that Louisa, now the wife of William Philip De Grouchy, who was born in March, 1818, Rosalie Chapman, James Edward Chapman, all of whom were living at the testator's death, and William Chapman, who was born after the death of the testator, were now living and parties to this suit, and that none of the children had died, having attained twenty-one, or had been married or left issue.

George Priest died in October, 1828, and several changes took place in the trustees. Parts of the real estate were sold, and the income arising from the residue was accumulated, and one moiety was paid to the children of C. W. Chapman. In November, 1847, when the twenty-one years from the testator's death expired, the accumulations as to one moiety amounted to 4,614*l.* 16*s.* and 652*l.* 16*s.* 6*d.* reduced annuities, and the accumulation since November, 1847, amounted as

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to the said moiety to 248*l.* 2*s.* reduced annuities, four-fifths of which it was agreed had arisen from real estate, and one-fifth from the personal estate.

The question now was, who were the parties entitled to the accumulation upon this moiety since the expiration of the term of twenty-one years?

Roupell and Sheffield, for the plaintiff Frances Edwards. *Macdonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; on appeal, 4 Myl. & Cr. 231; *Elborne v. Goode*, 14 Sim. (N. S.) 165; *Halford v. Stains*, 16 Sim. 488; *Bourne v. Buckton*, 2 Sim. (N. S.) 91; s. c. 4 Eng. Rep. 144; *Pride v. Fooks*, 2 Beav. 430; *O'Neill v. Lucas*, 2 Keen, 313. The 39 & 40 Geo. 3, c. 98, prevents all accumulation of income beyond twenty-one years from the death of the testator; after that the law must distribute the income as it arises *de die in diem*. The 2d section, respecting portions, cannot apply to this case. The gift here is of the *corpus*, which was partly to consist of accumulation, which can now no longer legally be made, and the entire fund is to be distributed at some time still to be ascertained. This must be the construction of the statute, or otherwise the smallest gift to the parent will render this act a nullity. The costs also must be borne by the testator's estate, and cannot be charged upon the accruing income, which is an interest daily vesting.

T. Parker, for the executor of Thomas Edwards, who had died since the report. The event of Frances Edwards not having a child had never been contemplated by the testator: the accumulations *ultra* the twenty-one years, are not disposed of, and cannot pass by the residuary clause. The act directed the law to distribute the income immediately on the expiration of the twenty-one years; the heir at law therefore became entitled to the income arising from the real estate, and the next of kin to the income of the personalty.

R. Palmer and Fooks, for Mr. and Mrs. De Grouchy. It is a principle of law that every thing undisposed of falls into the residue and goes with it. *Ellis v. Maxwell*, 3 Beav. 587. A disposition, therefore, of the whole estate would be good, and except for the 39 & 40 Geo. 3, c. 98, this was the only substantive gift of the residue, as it carried over all which comes in by operation of law or otherwise, for the benefit of those who can take. What, then, is the period for these accumulations? The act never came into operation with respect to the original fund. The will referred to the period after mentioned. What was that period? The reference was to the children of either family; payment was then to be made of the share of each child, and no share was to vest until some child of one family attained twenty-one. In this will there is but one undivided period of distribution. 1 Roper on Legacies, 40. The first child of C. W. Chapman attained twenty-one in 1839; until, therefore, one child became entitled to payment there was no period of distribution; there would, therefore, have been no period of intestacy, but the whole would have been swept into

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the residue for the parties entitled. But is not this case within the exceptions in the 39 & 40 Geo. 3, c. 98? The will contained an express gift over only in case of there being no children of either party; that is, a gift of the whole by implication: the testator clearly meant the children of either to take all. It is not necessary that the parent should take an interest in the estate or fund out of which the accumulations are directed; it is sufficient if he takes an interest generally, under the instrument which directs the accumulations. *Lord Barrington v. Liddell*, 22 Law J. Rep. (N. S.) Chanc. 1; s. c. 13 Eng. Rep. 445; *Middleton v. Losh*, 22 Law J. Rep. (N. S.) Chanc. 42. Again, the meaning of the word "portions," in the 2d section of the act, has not been defined by any authority.

Lloyd and Surragé, for William Chapman. The testator has put himself *in loco parentis*, and he provides for the party, and the children of that party. The fund in this case, therefore, must be carried over to abide the result of Frances Edwards having a child or not. The testator deals with the income and the *corpus* separately. *Jones v. Maggs*, 9 Hare, 605; s. c. 10 Eng. Rep. 159. If the residue alone is dealt with, and the accumulations fall back, it is virtually the same disposition, and the whole is not given; but if the period of division of the residue has arrived, and half of the accumulations belong to the family of C. W. Chapman, and there is no party entitled to receive the other moiety, owing to an unascertained contingency, the fund must continue to be accumulated for those to whom it is subsequently bequeathed, and for that purpose it must be invested.

Trevor v. Trevor, 5 Russ. 24; *Byng v. Lord Strafford*, 5 Beav. 558; Chanc. 169; s. c. nom. *Hoare v. Byng*, 10 Cl. & F. 508.

Stevens and Hetherington, for the trustees.

THE MASTER OF THE ROLLS. The testator desired that the accumulations of income arising from his estate should be continued as to one half of his residuary estate until a child of his nephew Charles William Chapman should attain the age of twenty-one years. In 1839, Louisa, one of the children of Charles W. Chapman, did attain that age, and the period for the distribution of that half was then ascertained. As to the other half, the will directs the accumulation to go on until there was children of his granddaughter, Frances Edwards, who could take; and this clause confirms this, as it expressly directs the accumulations to be so divided. Independent, therefore, of the operation of the Thellusson Act, I am of opinion that these accumulations were expressly directed to go on until one half of them could be given to the child or children of Frances Edwards, in equal shares and proportions. The observations on *Lord Barrington v. Liddell*, and *Middleton v. Losh*, do not seem reconcilable with the previous cases, and certainly create some embarrassment. In *Longdon v. Simson*, 12 Ves. 295, there was a direction to accumulate in favor of a person not then born until he should attain the age of twenty-one years; and it was held that the accumulations were good

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for twenty-one years. I shall not express any opinion as to what ought to have been the original construction of the statute; but, holding that this case comes within it, I shall leave it in doubt whether I do or not disapprove of what it is now too late to alter. It would be a most serious evil if decisions were to be unsettled upon an idea that the correct conclusion was not arrived at upon the original occasion. In *Forth v. Chapman*, 1 P. Wms. 663, the court held that the words used in the will were as applicable to real as to personal estate. Lord Kenyon was so much struck with the singularity of that decision that he attempted to alter its effect. *Porter v. Bradley*, 3 Term Rep. 143; but Lord Eldon, in *Crooke v. De Vandes*, 9 Ves. 197, when he found what had been done, said it was straining settled rules, from which most serious consequences would arise, and that whether it would have been right to have decided differently in the first instance, he would not say, but it was then too late to alter it. I am extremely anxious to avoid the reproach that decisions in equity vary with the measure of the Chancellor's foot; or in other words, that they are unlimited by law, founded in caprice, and based on no settled rules. It is possible that judges might think that wrong decisions have been come to, for instance, upon the Statute of Mortmain; but conceive what would be the effect if it was now said that they ought not to govern the decisions of the court. In Lord Eldon's opinion decisions upon equitable mortgages had gone a great way to repeal the Statute of Frauds, but after such a length of time it would be dangerous to say that they were wrong.

In this case, if the construction now contended for by the defendants were to prevail, it would, in a great majority of cases, render the statute wholly nugatory, as accumulations might be directed to any amount if a testator previously gave the parties a trifling interest in the legacy; questions of illusory gifts, however, might then arise, in which case a new course of litigation would be opened. It is only upon the notion of some definition being applied to the word "portion" that I can reconcile the cases of *Lord Barrington v. Liddell* and *Middleton v. Losh* with the previous cases which do not contain that word, neither do I believe that there is any case which defines that word. If it was construed as a gift to persons in the character of children it would only raise further technical definitions and additional embarrassment. I shall therefore adhere to the earlier decisions, and hold that the statute applies to the present case, and consequently that the direction to accumulate beyond the twenty-one years after the testator's decease is, as to one half of the residue, void for the excess.

It is of consequence that the construction should be without doubt; it would, therefore, be desirable to have the opinion of the Lord Chancellor and the judges of appeal, as the question was apparently settled previous to the cases cited.

Barton v. Whitcomb.

BARTON v. WHITCOMB.¹

January 15, 1853.

Practice—Service of Notice of Replication—28th General Order of August, 1852.

Where an appearance has been entered by the plaintiff for the defendant who has absconded, notice of the filing of the replication under the Chancery Procedure Amendment Act, and the 28th of the General Orders of August, 1852, is to be left at the last known place of abode of the defendant, and to be advertised in the Gazette and in two county papers.

THE question raised by this application was, in what way service of the replication was to be made under the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, s. 26, and the 28th of the General Orders of the 7th of August, 1852, (21 Law J. Rep. (N. S.) Chanc. 4.) The bill was filed to dissolve a partnership. No answer was required from the defendant, for whom an appearance had been entered under the order of the court; and consequently there was no place fixed for the service of notices; and the question was how notice of the replication was to be given.

The application had been previously made to the lords justices; who, considering that the order to be made in this case would regulate the general practice, desired the matter to be mentioned to the full court.

Renshaw, for the application. According, to the general practice, some service of the replication is necessary. Under the old practice, the case would have fallen under the 77th and 78th of the General Orders of May, 1845, (14 Law J. Rep. (N. S.) Chanc. 291); but by the present practice, the defendant is to be considered as having traversed the bill, and issue is joined by the plaintiff filing a replication.

THE LORD CHANCELLOR,—after conferring with the lords justices, directed that the notice of the filing of the replication should be served at the last known place of abode of the defendant, and be advertised in the Gazette, and also in two county papers circulating in the locality in which the defendant resided.

¹ 22 Law J. Rep. (N. S.) Chanc. 523; 17 Jur. 81.

Summerfield v. Prichard.

SUMMERFIELD v. PRICHARD.¹

April 12 and 14, 1853.

Inspection of Documents — Agent.

A plaintiff, under an order for himself, his solicitors and agents, will not be allowed to take with him a relation to assist in the inspection of documents admitted by the defendants to be in their custody.

THIS was a motion to commit the defendants, John Prichard, Robert Rosbottom, and Ann his wife, and asking that John Widnall, as the agent of the plaintiff, might have liberty to inspect, peruse, and take copies of the documents admitted by the defendants' answer to be in their custody.

On the 29th of November, 1852, an order was made, that the plaintiff, his solicitors or agents, should be at liberty at all reasonable times, upon giving reasonable notice, to inspect, peruse, and take copies, at the office of the defendants' solicitors, at Liverpool, of the documents relating to the matters in question in the cause, which the defendants, by their answer, admitted to be in their custody or power. Under this order, the plaintiff, with his uncle, John Widnall, as his agent, requested to inspect the deeds: but this was refused by the solicitors of the defendants, on the ground that he had instigated the suit, and was neither the solicitor nor agent of the plaintiff.

Hobhouse, in support of the motion. The suit is instituted to obtain accounts of a business carried on by the testator in the cause; he left John Prichard, and his wife Ann, now Mrs. Rosbottom, his executors; the testator's affairs fell into their hands, and they continued to carry on his business; at the time of the death of his father the plaintiff was thirteen years of age; he could know nothing of the accounts, and upon applying with John Widnall, his maternal uncle, for an inspection of the documents, it was refused. Mr. Widnall denied that he had instigated the suit; he was, however, the best party to assist the plaintiff in the inspection of the documents, as, having been a clerk with the testator, he not only understood the testator's business, but also the accounts. The only case at all bearing upon the point is *Bariley v. Bariley*, 1 Drew. 233; where a plaintiff, under an order similar to the present, was not permitted to take another defendant with him to assist in the inspection of the documents.

Baily and C. Hall. A solicitor can comprehend these accounts as well as any other person; to make the order asked for will be to

¹ 22 Law J. Rep. (N. S.) Chanc. 528; 17 Jur. 361.

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introduce a new rule. Most of the accounts are set out in the answer. The defendants consider that the present application arises from improper motives.

Hobhouse, in reply.

April 14. THE MASTER OF THE ROLLS. I cannot consider the uncle as the agent of the plaintiff for the inspection of the books and papers in the cause. I do not think it within the terms of the order, and consequently I must refuse the motion.

MOUNT v. MOUNT.¹

March 13, 14, 15, 17, 21, 1851.

Settlement — Trust — Interest of Children.

By settlement, personal estate was limited, after the death of the husband and wife, in trust for all the children as tenants in common, and the several issue of the body of such children; and, failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or, being such, all should die before their shares should become payable:—

Held, that the children of the marriage took absolute interests, and that the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share.

IN 1809, by the settlement made on the marriage of Mr. and Mrs. Mount, a sum of money was settled on Mrs. Mount for life, with remainder to Mr. Mount for life; and, after the death of the survivor, upon the trusts following:—

“Upon trust for all and every the child and children of the said Mary Partridge by the said Plomer Mount, her intended husband, lawfully to be begotten, both sons and daughters, equally to be divided between or among them, (if more than one,) share and share alike, and to take as tenants in common, and not as joint tenants, and the several issue of the body and bodies of all and every such child and children lawfully issuing; and failing issue of any such child or children, then as to the share and shares of him, her, or them so dying without issue, to the use and behoof of all and every such surviving child or children, to take in like manner as tenants in common, and not as joint tenants, and the issue of the body and bodies of such other child and children lawfully issuing. And if all such children but one shall die without issue, or there shall be but one such child, then to the use of such only child, and the issue of his or

¹ 18 Beavan, 393.

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her body," to be paid at twenty-one or marriage, and the interest, &c., in the mean time, to be applied towards their respective maintenance and education.

Provided always, "that in case there shall be no issue of the said intended marriage, or any issue of such issue, or being such, all of them shall happen to die before any of their shares shall become payable by virtue of these presents, then upon trust" for the next of kin and representatives of the wife, according to the statute.

There were three children of the marriage; Plomer, who attained twenty-one, and died a bachelor; Henry, who died an infant, and Sarah, who married Mr. Chambers, and having survived her two brothers, died in 1847, leaving two children. Mrs. Mount was dead, but Mr. Mount was still living.

The plaintiff, the representative of the two children, Plomer and Henry, by this bill, claimed to be entitled to two thirds of the fund, subject to the existing life estate.

Turner and Pain, for the plaintiff, claimed two thirds of the fund. They cited *Donn v. Penny*, 1 Mer. 20.

Roupell and Tripp, for mortgagees.

Walpole, for the children of Mrs. Chambers, contended that they took the whole fund, and argued that there was a gift by substitution to the issue, in case of the death of the parent before the period of distribution. He cited *Hougrave v. Cartier*, 3 Ves. & B. 79; *Bouverie v. Bouverie*, 2 Phill. 349; *Cripps v. Wolcott*, 4 Mad. p. 15; *Crowder v. Stone*, 3 Russ. 217; *Shailer v. Groves*, 6 Hare, 162; *Morse v. Lord Ormonde*, 1 Russ. 382; *Bright v. Rowe*, 3 Myl. & K. 316.

Goodeve, for the representative of Mrs. Chambers, who survived her two brothers, claimed, first, the whole by survivorship under the gift over on failure of their issue; or, secondly, supposing there was no right of accruer in respect of the brother who first died, then he claimed five sixths of the whole. He contended, that the children took absolute interests, with a gift over to the survivor in case of their deaths before distribution without issue. He cited *Morse v. Marquis of Ormonde*, 1 Russ. 382, and *Crowder v. Stone*, 3 Russ. 217.

Simpson, for the trustees.

Turner, in reply, contended that the limitation over upon a general failure of issue was invalid.

THE MASTER OF THE ROLLS. It is needless to go through the authorities. This case has been argued with a great deal of ingenuity, but I cannot say that in my mind the result is successful; I think it admits of much less argument than conjecture. In all cases of supposed intention, it is, no doubt, important to look to the several

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objects which the testator had in view, for the purpose of getting some slight guide to that which it is probable was his intention. But there is no expression more abused than that word "intention;" nothing is so strained in favor of the particular view which counsel is supporting. When the words are plain, you must strictly adhere to them; but where they are obscure, you are left exceedingly in doubt when you attempt to be guided by what is called "intention." The safe rule is, if possible, to abide by the construction given by the authorities to the words in the instrument.

I am of opinion that, in this case, the favorable construction is that which has been argued for by the plaintiff. Here there is a limitation after the death of the parents, to the children and their several issue, and a limitation over upon the general failure of issue.

I think the three children took absolute interests, and that the plaintiff is therefore entitled to two thirds of the fund.

BYRNE v. NORCOTT.¹

March 13, 14, 15, 17, 25, 1851.

Trustees — Breach of Trust — Costs.

In 1826, a debt due from a firm at Calcutta, was assigned to trustees in England, in trust to call in and invest on Indian securities, and accumulate. The debtors became bankrupts in 1830, and the trustees not having, in the mean time, taken proper steps to call in the money, a considerable portion of the debt was lost:—

Held, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees who had been abroad with his regiment during that period, was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India.

Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it.

By the settlement made on the marriage of Mr. and Mrs. Byrne and dated the 1st of September, 1826, a sum of 10,000 sicca rupees then due from Messrs. Palmer & Co., merchants of Calcutta, and a sum of 4,600 sicca rupees, secured by two promissory notes, of the India government, called "government paper," which Messrs. Palmer & Co. held for Fanny Byrne, the mother of Mr. Byrne, were assigned to Captain Norcott and Mr. Connell, upon trust, to call in and receive the balance of the sum of 10,000 sicca rupees, and interest, then due from Messrs. Palmer & Co., and lay out and invest such balance, when received, in their names, in or upon the before-mentioned or some other Indian government securities; and upon further trust, to

¹ 13 Beavan, 336.

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receive the interest thereof when invested, and the interest on the 4,600 sicca rupees, so standing in the name of the said Fanny Byrne, in order that the same might accumulate at compound interest, until it should be of the value of 4,000*l.* sterling, and then to pay the dividends to Mr. Byrne for life, with remainder to Mrs. Byrne for life, with remainder to the children of the marriage. The settlement contained a power to alter and vary the securities.

On the 2d of September, 1826, Fanny Byrne wrote to Messrs. Palmer & Co., setting forth the purport or effect of the settlement, and requesting the firm to attend to the instructions they should receive from the trustees. On the 4th of September, 1826, Mr. and Mrs. Byrne, and Captain Noreott, and Mr. Connell, (the trustees,) wrote to Messrs. Palmer & Co., stating the effect of the settlement, and requesting them to invest the 10,000 sicca rupees, and interest thereon, in such government securities in India as they might think best, in the trustees' names, and also to invest the dividends and the interest on the 4,600 sicca rupees, that the same might accumulate.

Messrs. Palmer & Co. transferred the cash balance in their books to the credit of the trustees, and on the 9th of May, 1827, wrote an answer to the letter of the 4th of September, 1826, so stating, and that it was necessary to have a special power of attorney to transfer the government paper into the names of the trustees.

Nothing more was done by the trustees; the money remained in the hands of Messrs. Palmer & Co., who, in 1828 and 1829, sent in their account to Mr. Connell, and in January, 1830, they became insolvent, whereby two thirds of the 12,000 rupees at that time remaining in their hands were lost.

On the 13th of January, 1830, and before the insolvency was known in London, Mr. Connell wrote to Messrs. Palmer & Co., complaining of their having departed from their instructions given in September, 1826, and directing an immediate compliance therewith.

In September, 1833, the trustees wrote, appointing Messrs. Boyd & Co. their agents in Calcutta, to receive and invest the trust funds. Messrs. Boyd & Co. continued agents till 1840, when they also failed, having 1,837 rupees, part of the trust property, in their hands.

Until 1836, no power of attorney was obtained from Fanny Byrne for the transfer of the government paper.

In 1844, the trustees appointed Messrs. Mackillop agents in Calcutta.

The bill was filed in 1848, by the children of the marriage, alleging that the losses to the trust fund had been occasioned by the neglect and default of the trustees, and seeking to compel them to make good the whole of the trust funds, with such accumulations as might have been made thereon in the due execution of the trusts of the settlement. The bill prayed a declaration, that the trustees were guilty of a breach of trust, in permitting the cash balance, in the hands of Palmer & Co. and Boyd & Co., at the time of their insolvency respectively, to remain in their hands or uninvested, and in not using due diligence for causing the same to be invested according to the trusts of the settlement, and that they were also guilty of a breach

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of trust, in not using due diligence to receive the dividends of the estates of the insolvent firms, and the interest on the securities, and in not accumulating the trust funds. It prayed an inquiry as to what the trust funds would now produce in amount, if the same had been duly invested and accumulated; and it sought to make the trustees liable for the loss.

With regard to the trustees, it appeared that Connell was a Scotch law agent resident in London, and that Captain Norcott was in the army, and that in June, 1827, before any answer had been received to the letter of the 4th September, 1826, he left England to join his regiment at Halifax in Nova Scotia, where he remained with his regiment, till September, 1830, when he returned to England, and arrived in November, 1830. He remained in England or on the Continent till the spring of 1832, when he rejoined his regiment in America. In September, 1833, he came to England, and then concurred with Connell in appointing Messrs. Boyd & Co., of Calcutta, agents of the trust there. He soon afterwards proceeded to Jamaica, and embarked for that island on the 25th of December, 1833, remained there until November, 1836, when he again returned to England, from which time until October, 1840, he was in England or in Ireland, with his regiment, or on the staff; in October, 1840, he again left England with his regiment, and remained abroad until March, 1846, being part of that time quartered at Malta, and part of the time at Corfu.

The cause now came on for hearing.

Turner and *Smythe*, for the plaintiffs, argued, that the trustees had been guilty of a breach of trust by their inattention to the duties imposed by the settlement, and were liable to make good the whole loss occasioned.

Walpole and *G. L. Russell*, for Captain Norcott, argued, that he had been prevented by unavoidable necessity, in consequence of his absence on public duties from England, from attending to the matters of the trust, and that he was therefore relieved from those responsibilities which might have attached to him if resident in England.

Roupell and *R. W. Moore*, for Connell, urged the difficulties which had existed in performing the trusts as to property so far distant, and the great hardship of making trustees personally responsible for involuntary losses. They argued that there was not, in this case, sufficient neglect to render the trustees liable.

Prior for Mr. and Mrs. Byrne.

Turner, in reply.

Munch v. Cockerell, 5 Myl. & Cr. 178, and *Ex parte Belchier*, Ambler, 218, were cited.

THE MASTER OF THE ROLLS. This is one of those very distressing

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cases which often occur in this court, in which persons, wholly guiltless of any bad design, and intending to do nothing but acts of kindness towards other parties, have, by those very acts of kindness, omitted to perform duties with which they were charged; and the consequence has been, that a very great loss has occurred, which, by the rules of this court, those who have made that omission are undoubtedly bound to make good.

I must say, that this case has been conducted with as much forbearance as was consistent with the duty imposed on counsel of enforcing the rights of those who rely upon them.

The facts of the case are these:— Upon the marriage of Mr. and Mrs. Byrne, in 1826, certain property in the East Indies, which belonged to the mother of Mr. Byrne, became the subject of a settlement. It consisted, in part, of a balance due from Messrs. Palmer & Co., of Calcutta, and in part of certain government or East India government paper, to the amount of 4600 rupees. The situation of the parties was such, at that time, as to make it prudent and proper to accumulate the property, and the parties appear to have been willing to forego the present enjoyment of the income, for the purpose of accumulating the sum of 4,000*l.*, which they probably thought might be done in the East Indies, as safely as and more quickly than in England. It was therefore provided by the settlement, that the 4,600 rupees should be transferred into the names of the trustees, and that the 10,000 rupees, which were in the hands of Palmer & Co., should be received from them and immediately invested, and that the dividends should, from time to time, be received on the behalf of the trustees, and accumulated until the sum of 4,000*l.* was raised, and which, after it had been so accumulated, was intended for the benefit of the husband and wife, and ultimately for the benefit of the children.

Mrs. Byrne, the mother, whose property it seems to have been, covenanted that she would do all which might be necessary on her part to procure a transfer of those funds. Nothing could apparently have been more simple than the duty undertaken by the trustees; they had nothing to do, in the regular conduct of the business, but to invest the accumulations. Unfortunately, those investments were to be made in the East Indies, the trustees being far off, and disasters arose in the execution of the trust. The first act, which was one of very great propriety on the part of the trustees and of Mrs. Byrne, was, to inform the agents in India of what had been done, and what were the trusts of the settlement. The trustees also wrote instructions to do what was necessary for them in the execution of the trust; and they directed that they should send their accounts to Mr. Connell. All that seems to have been perfectly rightly done. The letter arrived in the East Indies, in the usual course from England. The agents then stated that they could not fully act upon the instructions, because they wanted a power of attorney to enable them to do so, and they stated, that they had transferred the 10,000 rupees to the account of the trustees. They had it then in their power to receive, and they did receive, the interest upon the government paper. What they therefore

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did, was to receive the dividends upon the government paper, and to transfer the cash balance from the account of Mrs. Byrne, to the account of the trustees. This, certainly, was not a compliance with that which they had been directed to do, for they did not call in, and invest on government paper the 10,000 rupees, and they did not receive, invest, and accumulate the interest on the government paper. These things they neglected to do, and although they stated, that they could not follow the directions, because they had not got the powers from Mrs. Byrne, to enable them to make a transfer of the paper, still they did not offer the smallest apology or excuse for not obeying the directions which were given, to invest the cash balance and to accumulate the dividends.

Mr. Connell received this letter and was, as it appears by his own letter of 1840, perfectly aware that Palmer & Co. had departed from the instructions which had been given to them, and that the directions had not been obeyed. What did he do, during this long period of time which he allowed to elapse? He certainly appears, by the letter, to have been aware that it was, at least, desirable that the powers which had been asked for from Mrs. Byrne should be sent, but no step to procure those powers was effectually taken until the year 1836, or 10 years after the marriage.

With respect to the cash balance, though he knew, so early as the year 1827, that the directions which had been given by the trustees had not been obeyed, he did not take any step whatever upon the subject till the year 1830. Now I cannot help thinking, that this is an omission in the performance of a duty which this court cannot pass over. A gentleman who has taken upon himself the performance of the duties of a trustee, is bound to look after the execution and performance of those duties; and there is, in this case (I do not mean to say it in any harsh sense) an omission, in respect of which the court is bound to charge the party with the loss which may be reasonably supposed to have arisen from his neglect.

Is there a difference between the case of Mr. Connell and Captain Norcott? Hard enough it seems on Mr. Connell, who is stated to have had no acquaintance at all with the family, and certainly it is a matter of great surprise, how an entire stranger to the family should have taken upon himself such an onerous and arduous a duty as this, without having any reason of friendship or affection towards any of the parties to induce him to do it. Hard is it, I say, upon Mr. Connell, but still harder it would seem upon Captain Norcott, a military man, always probably intending to be on service, and actually going on service at a very early period, and being, during the greater part of these several transactions, on service abroad. He had given proper directions on the subject, and by the very giving of these directions, he assumed the performance of the duties. Can he then, because he goes abroad, because he is engaged in a military profession, for that reason be exonerated from taking any trouble whatever about this matter? Was he exonerated from making any inquiry whether the letter he had written had been obeyed, what was doing in this trust: — and whether the Indian agents were proceeding, from time to time,

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to act according to the directions given? Is he to be allowed to go entirely out of the way, and neglect giving any further attention to the business, leaving it merely to accident, or to the chance, that his co-trustee, Mr. Connell, would take upon himself the execution of the whole business?

I own it does appear to me to be a very hard case, and I think it extremely probable, that this gentleman had no idea of the sort of responsibility to which he was subjecting himself; but I am, nevertheless, of opinion, that having undertaken the performance of that duty, and continuing bound and liable to perform it, he cannot be exonerated from the consequences which have arisen from his neglect of it.

At the very period when Mr. Connell wrote the letter of the 13th of January, 1830, Messrs. Palmer & Co. had become insolvent. There is no allegation that they were not previously in credit, and there is no reason now before me to suppose, that they would not have paid what was due from them, if it had been demanded at first, in a proper manner; there was ample time to instruct other persons to proceed against Palmer & Co. if necessary, and it was clearly necessary, because they had plainly disobeyed the instructions which they had received. Circumstances of that kind do not admit of being trifled with; and it seems to me, that the trustees are necessarily to be charged with the loss which was incurred.

The plaintiffs are content to take the account as it stood at the time of the failure of Messrs. Palmer & Co., as being the full amount of accumulation up to that time. That being so, they are to be charged with that balance, and with the accumulations that ought to have been made upon that balance from the time of the bankruptcy.

The disasters of this trust did not end here. After a long lapse of time which cannot be well accounted for, attorneys were constituted to recover from Palmer & Co. the dividends, payable out of their estate. The plaintiffs admit that there must be an allowance of a reasonable time for sending out new powers, and they are content to allow the period intervening between the bankruptcy of Palmer & Co. and the end of the year 1831, as that, which, by an inevitable misfortune, namely, the failure of Messrs. Palmer & Co., the accumulations could not have been carried on; for that period, therefore, the defendants will not be charged.

It seems to me that the proper course is, to charge the trustees with such accumulations, and to make all proper allowances, and to give them the full benefit of all the profit made from the dividends received and the investments made by their direction.

With respect to the costs, I must say, I do not know of any instance where trustees are made to repair a breach of trust, in which they have not been charged with the costs of the suit. It is almost always a necessary consequence, for they ought not to add to the loss of their *cestuis que trust* the costs of the suit rendered necessary for the purpose of obtaining redress.

By the decree, the trustees were charged with the 12,837 rupees

Custance v. Cunningham.

the amount in the hands of Palmer & Co. at their failure, and with the accumulations which would have been made, if that sum and interest had been properly accumulated in Indian government securities, and also with the 5,600 rupees, and similar accumulations. But they were not to be charged with accumulations during the period stated in the judgment and during another similar interval, which occurred in sending out powers to Mackillop & Co. Their liability was also limited to 4,000^l sterling.

CUSTANCE v. CUNNINGHAM.¹

January 13, 1851.

Injunction — Gift — Undue Influence.

Where a special injunction has been obtained on affidavits, and on the answer coming in, the defendant moves to dissolve, such affidavits may be used against the answer.

An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore, that there had been a gift of it to him, subject to a trust for the transferor, for life. An injunction to restrain the transfer and receipt of the dividends was continued.

In this case, an old woman, who had accumulated a sum of money, which was standing in her name in the funds, had transferred it into the name of the defendant, in whose house she lodged, apparently without any consideration. The defendant insisted that there had been a gift to him, subject to the payment of the dividends to her for life.

Upon this bill being filed by her administrator, insisting on the invalidity of the transaction, an *ex parte* injunction had been granted on affidavit. The defendant put in his answer, insisting on the validity of the gift to him, and he now moved to dissolve the injunction. The principal point raised was, whether, where an injunction is granted before answer on affidavits, such affidavits can be used against the answer on a motion to dissolve the injunction after the answer comes in.

Forster, in support of the motion, insisted, that, by the practice of the court, such affidavits could not be now received, and at all events, that they could not be received as to matters of title. He argued that as the defendant could not, on the present application, support his answer by affidavit, it ought to be taken as true, and that the affidavits previously filed ought to be rejected, at least as to all matters of title.

¹ 13 Beavan, 363.

Custance v. Cunningham.

Turner, *contra*, contended that the practice of the court was the reverse, and that the only limitation against using affidavits against the answer was, that those could not be used which had been filed after the answer.

The following authorities were cited. *Manser v. Jenner*, 2 Hare, 603; *Morphett v. Jones*, 19 Ves. 350; *Atkinson v. Kemble*, 7 Sim. 638; *Rock v. Mathews*, 2 De G. & Sm. 227; 3 Daniel's Practice, p. 356, (1st ed.): and see Eden on Injunctions, 326.

THE MASTER OF THE ROLLS. My strong impression is, that the usual practice in this branch of the court has always been, that where an injunction has been obtained on affidavit, and after the answer comes in, the defendant moves to dissolve, the affidavits filed before the answer may be used on that occasion. I cannot say they have ever been rejected here.

The motion then proceeded.

Forster for the motion.

Turner, *contra*.

Forster, in reply.

THE MASTER OF THE ROLLS. This is a case as full of suspicion as any I have ever met with. An old woman who had accumulated a sum of stock has, it is said, been induced, by some means or other, to make a gift of this sum to the defendant, he being a person in whose house she lodged, subject only to the payment of the dividends to her for life.

There is no memorandum of agreement, and nothing to show, either that he was to have this stock, which previously clearly belonged to her, or even that he was to account for these dividends. It rests entirely on his own statement, and on the fact, that she has made the transfer and has received the dividends. There is, therefore, nothing to show that the defendant is entitled either to the capital or dividends, except his single oath. He says that he has witnesses to prove the transaction; he does not produce one, but asks, on his own statement, that the injunction may be dissolved altogether, or at least that he may have the income pending the suit. The circumstances of this case are so fraught with suspicion, that I cannot bring myself to allow him to have either.

If I were to proceed on the affidavits, the matter would be clear from doubt; but I think there is sufficient upon the answer alone to induce me to say, that the parties ought to be put to the proof of their rights, and that I cannot dissolve this injunction.¹

¹ The suit was subsequently compromised, and the fund equally divided between the plaintiff and the defendant. See the 15 & 16 Vict. c. 86, s. 59.

Cunliffe v. Whalley.

CUNLIFFE v. WHALLEY.¹

January, 21, 22, and 24, 1851.

Injunction.

The trustees of a turnpike road which passed over a hill, were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The court, however held, that, it had no authority to interfere, and refused the application.

THIS was a motion, made by the plaintiff, a trustee of a turnpike road, appointed under the 1 Geo. 4, c. 14, (local and personal,) to restrain the defendant (the owner of an estate through which the road passed) from continuing or completing the construction of a tunnel under the turnpike road leading from Ruabon to Llangollen over Plas Madoc Hill, and from allowing the same to remain or continue, so as to endanger or obstruct, or interfere with the turnpike road, or the use thereof, or to interfere with the due improvement of the road by lowering the same.

Turner, Willes, and Freeling, for the plaintiff.

Allen, serg., *W. T. S. Daniel*, and *Gray*, for the defendant.

Turner, in reply.

The 3 Geo. 4, c. 126, s. 88, 7 & 8 Geo. 4, c. 24, s. 18, and the 9 Geo. 4, c. 77, s. 9, together with *Boulton v. Crowther*, 2 B. & Cr. 703; *Davison v. Gill*, 1 East, 64; *Jordin v. Crump*, 8 Mee. & W. 782; *Barnes v. Ward*, 19 L. J. N. S. (C. P.) 195; *The Attorney-General v. Aspinall*, 2 Myl. & Cr. 613; *The Company of Proprietors of Northam Bridge, &c. v. The London and Southampton Railway Company*, 9 L. J. (N. S.) Ch. 277; *Tulk v. Moxhay*, 11 Beavan, 571, were, amongst other authorities, referred to.

THE MASTER OF THE ROLLS. I will give my opinion on Friday.

January 24. THE MASTER OF THE ROLLS. The road mentioned in the notice of motion runs east and west from Ruabon to Llangollen. It passes through the Plas Madoc estate, and over the hill called the Plas Madoc Hill. The trustees of the road are represented by the plaintiff, the owners of the Plas Madoc estate by the defendant. There are coal mines on the Plas Madoc estate, and the turnpike road lies between the coal mines and the Chester and Shrewsbury Railroad.

The trustees of the turnpike road are, by statute, empowered to

¹ 13 Beavan, 411.

Cunliffe v. Whalley.

improve the road and to alter its course or path, and under that power are entitled to lower the road, when necessary and in their power; and on various occasions, in and after the year 1841, they have exercised that power. They appear to be entitled to exercise it, whenever they think it necessary and have the means, and it ought, I think, to be assumed, that the trustees, having the duty to improve the road at all times, intend to perform that duty when they can.

In the year 1848, the defendant, desiring to establish a communication by railroad between the Plas Madoc collieries and the Chester and Shrewsbury Railroad, and having, for that purpose, occasion to carry his road, which he calls a branch road, across the turnpike road, proposed to do so on the west side of Plas Madoc Hill, and applied to the trustees of the turnpike road for leave. The railroad then proposed to be made would have crossed the turnpike road at a hollow, and would have required an embankment or bridge to carry it across. Such an embankment or bridge, and the work connected with it, would have lessened the declivity from the top of Plas Madoc Hill to the lowest part of the road on the west side of the hill, and would consequently have been an improvement of the road, and the trustees consented to the work being made, on the payment by Mr. Whalley, the defendant, of 200*l.*, and in consideration, it may be presumed, of the improvement which it would make in their road. On negotiation of the matter, Mr. Whalley seems to have contemplated that his intended railroad was a private road, and on one occasion, at least, he so spoke of it, in addressing the trustees on the subject.

Mr. Whalley had arrangements to make with the Chester and Shrewsbury Railway Company, for the junction of his intended new road with the Great Chester and Shrewsbury Railway. These arrangements ultimately led to an alteration in the direction of a part of his own line, and particularly to an alteration in the place where, and the mode in which it was to cross the turnpike road. He resolved to carry it across on the east instead of on the west side of the Plas Madoc Hill, and the inclination of the ground is such, that at crossing the turnpike road on the east side, would lead to crossing by a cutting or a tunnel, instead of crossing by an embankment or bridge, which would have been the case on the west side as originally intended.

In negotiating the arrangements which led to this change, Mr. Wyatt (who was clerk of the trustees of the turnpike road) was the solicitor of Mr. Whalley, but it does not appear that Mr. Whalley had either through Mr. Wyatt, or otherwise, any communication with the trustees of the road on the subject.

As Mr. Wyatt was acquainted with all his proceedings and made no objection, Mr. Whalley may have thought, that no objection was likely to be made on the part of the trustees. He probably did not enough consider, that, upon that occasion, Mr. Wyatt was not acting in the performance of any duty to the trustees, and had no authority to communicate any of Mr. Whalley's plans or proceedings to the trustees without the directions of Mr. Whalley himself. It appears to me, that I have no sufficient ground for imputing to the trustees

any knowledge of the change in Mr. Whalley's plans until the month of July, 1850.

But Mr. Rice Hopkins was the engineer employed by Mr. Whalley to construct the new road: Mr. George Clark was the surveyor of the trustees; and on the 17th of July, Mr. Hopkins, by direction of Mr. Whalley, informed Mr. Clark of what was intended to be done, and no objection was then made. There is some discrepancy in the evidence as to this, but I think that Mr. Clark did not at first object.

I have stated, that, in the treaty of 1848, Mr. Whalley had, on one occasion, spoken of his new railway as a private road; but it appears that either his views were not then confined to a private road, or that after that time, his views on the use to be made of his new or branch railway had enlarged, and he naturally enough intended to make it as profitable as he lawfully and properly could, and, before July, 1850, he had formed the intention of allowing other persons to use his road, on such terms as he could arrange with them. Information of this intention having reached Mr. Clark, that gentleman, on the 24th of July, wrote to Mr. Hopkins and informed him, that if that were the fact, the trustees would not allow Mr. Whalley to make his branch railway under the turnpike road. This was taking up the matter with rather a high hand, and Mr. Hopkins wrote to Mr. Wyatt, and, omitting all notice of Clark's objection, attempted to turn the communication with the trustees to other points, and in a few days after, (30th July,) Mr. Wyatt wrote to Mr. Hopkins in a manner to show, that the objection was to Mr. Whalley making a railway to be used by others. He says, "The trustees, at great expense, opposed a branch line of railway, likely to ruin their road and resources on that line, and you may rely they will justly and zealously watch any possible chance of the company, that is, the railway company) getting and attaining the same end by this means, beyond a permission to Mr. Whalley himself."

After this, I think that each of the parties must be considered as understanding what the other aimed at.

Mr. Whalley desired to make a profitable railway through the Plas Madoc estate and across the turnpike road; and the trustees did not object to Mr. Whalley's making a railway for his own use, in the intended direction, but they considered (probably most justly) that such a railway, open to the use of any one who might be licensed by Mr. Whalley, would be extremely prejudicial to the resources of the turnpike road, and they determined to oppose it.

Mr. Clark, on the 10th of August, reported to the trustees, that if Mr. Whalley insisted on driving the tunnel, without agreeing to the things he (Mr. Clark) recommended, the lowering of the road had better be done previously about twelve feet, and his recommendations were adopted and ordered; and on the 13th of August, Mr. Hopkins wrote to Mr. Wyatt, that if his proposal as to a bridge were not adopted, Mr. Whalley would be obliged to incur the additional expense of making a tunnel through the Plas Madoc freehold, without interfering with the road.

I do not think it useful, minutely to trace the matter further; the

Canliffe v. Whalley.

parties became angry, and, as people in that condition do, misunderstood one another. They were, in fact, each of them acting in vindication of their supposed rights and duties, but now the question is, whether this court is to interfere with what has been done.

The defendant's tunnel has been completed; the road, as it was in July last, does not appear to have been at all injured; nor has the use of it been at all hindered or impeded.

The soil of the road is vested in the owners of the Plas Madoc estate, subject to the rights of the public, and to the powers and rights vested in the trustees by statute. See Co. 2d Inst. 705; *Sir John Lade v. Shepherd*, 2 Strange, 1004; *Rex v. Llandilo*, 2 Term R. 232; *Cooke v. Green*, 11 Price, 736; *Headlam v. Hedley*, Holt, 463; *Bouillon v. Crowther*, 2 B. & Cr. 703.

One of those powers is to lower the road in a legal and proper manner, and I think that I may presume, that there was a general intention to exercise that power, even at the particular place in question, when, if ever, it should be expedient to do so; but upon the evidence, I am of opinion, that at the time—that is, in the beginning of August last, it had not been, and it was not thought expedient to lower the road at this place, simply with a view to improve the road, and that the real intention of commencing the operation at that time was, to prevent or impede the construction of Mr. Whalley's road, which was thought, I suppose very justly, likely to be prejudicial to the road. No doubt it was the duty of the trustees to protect the resources of the turnpike road by legal and proper means; but I do not think, that they could put themselves in a better situation, by running the sort of race they did with Mr. Whalley, or that in this court at least, their case is at all different from that which it would have been, if they had not actually commenced the work of lowering under such circumstances.

I also think, that I ought to consider the case, as if the bill had been filed, on a discovery made by them, that Mr. Whalley was proceeding to make the tunnel, before any declared intention, on their part, to lower this part of the hill, and without any intention on his part to interfere with an improvement of the road, either commenced or in immediate contemplation; and I am of opinion, that this court has not jurisdiction to interfere.

The completion of Mr. Whalley's work and the execution of his intention to grant wayleave on his railway, may grievously prejudice the public use, and therefore the tolls and revenue of the turnpike, and to the extent perhaps of making it necessary to give notices and make compensation for future improvements of the road, by lowering it at the place in question:—it may affect the exercise of their right of improving the road, and make the improvement more troublesome and expensive; but I do not think, that this court has authority to interfere with the right of property, to the extent required to protect the trustees from such future contingency. If there were any such authority or jurisdiction, it would extend to prevent the use and enjoyment of property, to an extent not yet thought of, and by no means safe or proper to encourage.

Lushington v. Boldero.

The court would, undoubtedly, wish to put questions of this nature into a course of immediate investigation and decision; and there are, I believe, cases, in which, by arrangement, this has been very usefully done. But there is no such general authority. If it existed, it would enable the courts to do what it has often been desired they should be able to do,—that is, to support suits for the mere declaration of rights, suits of which nature are indeed admitted in Scotland, but have not yet been authorized here. But see 15 & 16 Vict. c. 86, s. 50.

The motion must therefore be refused.

LUSHINGTON v. BOLDERO.¹

November 4, 5, 1850.

Practice — Parties.

An estate was devised to A, for life, without impeachment of waste, with remainder to his issue in tail; with remainder to B, for life, without impeachment, &c.; with remainder to his issue in tail. A had no issue, and his assignees having committed equitable waste, it was held, that the right to the produce could not be determined until the death of A, as he might have issue who possibly would be entitled to an interest in such produce.

IN 1785, the testator devised estates to Charles Boldero for life, without impeachment of waste, with remainder to his first and other sons in tail, with similar limitations to William Boldero, for life, without impeachment of waste, with remainder to his first and other sons in tail, with remainder to Henry Lushington, for life, without impeachment of waste, with remainder to his first and other sons in tail, with divers remainders over.

In 1812, Charles Boldero and Henry Lushington became bankrupt, and their assignees, having committed equitable waste, by felling ornamental timber, were ordered to pay into court 6,379*l.* 4*s.*, the produce of the timber and interest, to an account intituled, "The account of timber felled by the defendants, the assignees of the estate of Messrs. Boldero, Lushington, & Co., bankrupts." This, by accumulation, now amounted to 26,000*l.*

The present state of the family was as follows:—

William Boldero died without having been married. Charles Boldero was living, and was of very advanced age and had no issue. The plaintiff was the eldest son of Henry Lushington and the first tenant in tail *in esse*; he now presented his petition for payment to him of the fund in court.

¹ 13 Beavan, 418.

Cowpe v. Bakewell.

Malins and *Tripp*, in support of the petition, argued, at length, that the doctrine as to legal waste was equally applicable to equitable waste, and that, therefore, the first tenant in tail *in esse* was entitled to the produce. They cited *Lewis Bowles' case*, 11 Rep. 79; *Whitfield v. Bewit*, 2 P. W. 240; *Bewick v. Whitfield*, 3 P. W. 267; *Dare v. Hopkins*, 2 Cox, 110; *Powlett v. The Duchess of Bolton*, 3 Vesey, 374; *Wickham v. Wickham*, 19 Vesey, 419, and Sir G. Cooper, 288; *Lushington v. Boldero*, 6 Mad. 149; *Tooker v. Annesley*, 5 Simons, 235; *Waldo v. Waldo*, 12 Simons, 107; *Phillips v. Barlow*, 14 Simons, 263; *Delapole v. Delapole*, 17 Ves. 150.

They offered to give security against the possibility of the interest of any issue of Charles Boldero who might come into *esse*.

Turner and *Goldsmid* for the assignees.

THE MASTER OF THE ROLLS said, that the point could not be decided in the absence of any of the parties interested; and as it could not be said, that the issue of Charles Boldero, if there should be any, had no possible interest in the fund, the case, during the life of Charles Boldero, was not ripe for decision.¹

COWPE v. BAKEWELL.²

January 18, 1851.

Vendor and Purchaser — Interest — Rents.

A purchase was to be completed on a given day, when the purchaser was to have possession, and it was provided, "that if, from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months occurred from the default of the vendor in not furnishing proper abstracts:—

Held, that the purchaser must pay interest, unless he gave up the rent, during that period.

SOME property was sold by auction, on the 15th of May, 1850. By the conditions of sale, the abstract was to be delivered within ten days. Requisitions were to be made within twenty-eight days, and the purchase was to be completed by a conveyance, on the 31st of July, 1850, when the purchase-money was to be paid into court, and the purchaser was to be let into possession, or receipt of the rents. "But if, from any cause whatever," the purchase-money should not be paid, the purchaser was to pay interest at five per cent. from the 31st of July.

¹ After the death of Charles Boldero, the petition was brought on again and an order was made thereon; see 15 Beavan, 1.

² 13 Beavan, 421.

Reeves v. Baker.

The delay occasioned by the delivery of imperfect abstracts of title prevented the completion down to the present time. An application being now made to pay the purchase-money into court,

Turner and *C. P. Phillips*, for the purchaser, insisted, that he was not bound to pay interest on the purchase-money, as the delay had been occasioned by the vendor; besides which, notice had been given by the purchaser that the money was lying idle. *De Visme v. De Visme*, 1 Hall & Twells, 408, and 1 Mac. & Gor. 336; *Roberts v. Massey*, 13 Vesey, 561; *Greenwood v. Churchill*, 8 Beavan, 413, and *Robertson v. Skelton*, 12 Beavan, 363, were cited.

Selwyn, contra. The rents, during the period in discussion, exceed the interest. If the purchaser takes the rents from the time at which the purchase ought to have been completed, he cannot be relieved from paying interest.

Turner. But here the purchase-money was lying idle, with notice to the vendor.

THE MASTER OF THE ROLLS. The purchaser cannot retain both the rents and interest. I think there was a delay innocently occasioned by the vendor. He delivered the abstract so late, that the purchaser had no time to deliver objections until after the day appointed for payment. He may have his option either to pay interest or give up the rents.¹

REEVES v. BAKER.²

March 8, 1851.

Pleading — Answer — Impertinent Matter.

Matter ought not, at the commencement of a suit, to be treated as impertinent, which may, at the hearing, be found relevant.

A trustee called on the defendant to set forth whether, for the reasons in the bill stated, or some other and what reasons, he was not unable to execute the trusts, "or how otherwise." The defendant, in his answer, imputed to the plaintiff's solicitor needless delay in effecting a proposed compromise, his inducement being to favor another solicitor, his personal friend:—

Held, that the statement was not scandalous.

JOHN REEVES devised his property to his widow, Mary Reeves, coupled, however, with a precatory trust in favor of "their united relatives."

¹ See *Wallis v. Rarel*, 5 De G. & S. 429.

² 13 Beavan, 436.

Reeves v. Baker.

Mary Reeves disposed of the property by her will amongst relatives; and of this will, Henry and John Reeves were trustees, and Betsy Baker executrix.

Henry Reeves filed this bill for the administration of the two estates, and thereby stated, that Robert Baker, the heir at law of Mary Reeves, the widow, had filed a bill in 1848, contesting the validity of her will, which he had, in 1849, abandoned. That in consequence of the conflicting claims, the plaintiff and his co-trustee were unable to carry into execution the trusts of the two wills, except under this court.

The interrogatories asked, whether some and what questions and difficulties had not arisen, &c., &c., &c.; "whether for the reasons aforesaid, or for some other and what reasons, the plaintiff and his co-trustee were not unable to carry into execution the trusts of the will," &c., "or how otherwise."

Betsy Baker, by her answer, as to the suit of the heir, said, first, she believed that Messrs. Edwards and Godwin, (who were the solicitors of the trustees,) or some clerk in their office by their direction, had some communication with Robert Baker, who was put forward by them, and advised to dispute the validity of the will of Mary Reeves; and for such purpose, Messrs. Edwards & Godwin furnished Robert Baker with copies of the wills of John Reeves and Mary Reeves, and allowed him and his professional advisers to have access to the papers laid before counsel by the trustees, and supplied him with requisite information to enable him to file a bill to dispute the will of Mary Reeves, on the ground of her mental incapacity to make the same, and otherwise to dispute the said wills and codicils. And she said she believed, that he afterwards, as heir and legatee, "raised, or pretended to raise, questions touching the rights of the several persons claiming interests under her said will."

2. The defendant afterwards stated, that the parties interested had met and arranged terms of compromise, and that a deed had been prepared to carry it into effect; she added, she believed that such arrangement would have been carried into execution, but for the great and needless delay of the said Mr. Godwin to proceed therewith, he having insisted on the right of himself and partner (as solicitors of the trustees) to have the preparation of the deed of arrangement; and although this claim was forthwith conceded by Mr. Loscombe, (the opposite solicitor,) no act was done or other proceeding taken by Messrs. Edwards & Godwin to carry the arrangement into execution, until after the 19th January, 1850, and then only in consequence of the urgent solicitation and remonstrance of Mr. Loscombe.

3. The principal inducement to the aforesaid delay, as was alleged and as the defendant believed, being an attempt, on the part of the said Mr. Godwin, to favor the claims and pretensions of some or one of the parties professionally employed in the said suit of Robert Baker, but who, after its dismissal, had no authority to represent, and did not, in fact, represent, any of the parties to the said arrangement, such parties so professionally employed being the personal friends of the said Mr. Godwin.

Reeves v. Baker.

The plaintiff took three exceptions to this answer, affirming that the first two passages were impertinent, and the third scandalous.

Like exceptions were taken to two other answers, and the three sets of exceptions now came on for argument.

W. W. Cooper, in support of the exceptions. The first two passages are wholly immaterial to the merits of the cause, which relate to the construction of the wills. They are therefore impertinent.

The third passage alleges that the solicitors have betrayed the interests of the parties they represent, and have created litigation for the benefit of a professional friend; that in truth they are barrators. This useless imputation is scandalous.

Pamler and Cole,

Turner and Rudall and

Roupell and Hare, in opposition. The passages are neither scandalous nor impertinent, and they are drawn forth by the words "how otherwise" in the interrogatory, and that is a sufficient answer. *Robson v. Lord Brougham*, 19 L. J. N. S. (Ch.) 465. They will be material at the hearing on the question of costs, and ought, not now to be struck out. The parties will have a sufficient remedy in costs under the 122d Order of May, 1845, Ordines Can. 334. The solicitors make no complaint, (see *Williams v. Douglas*, 5 Beavan, 82,) and this information the defendants were bound to give. *Olley v. Gilly*, 8 Beavan, 602.

W. W. Cooper, in reply. The order applies to prolixity, and will not give the plaintiff the remedy he asks, of having the matter complained of at once expunged.

Wagstaffe v. Bryan, 1 Russ. & Myl. 28; *The Earl of Portsmouth v. Fellows*, 5 Mad. 450; *Pearson v. Knapp*, 1 My. & K. 312; *The Attorney-General v. Rickards*, 6 Beavan, 444, 1 Phil. 383, and 12 Cl. & Fin. 30; and see *Gilb. For. Rom.* 209; *Tench v. Cheese*, 1 Beavan, 571, were cited.

THE MASTER OF THE ROLLS. I adhere to the opinion expressed by me in *The Attorney-General v. Rickards*, that the court ought not, at the commencement of a suit, to treat as impertinent matter that which at the hearing may be found to be relevant.

I cannot, in the present any more than in the former case, venture to say, that the passages excepted to must ultimately turn out to be totally irrelevant. I conceive that in a case where there are questions of a doubtful nature, I am not bound to hold passages impertinent, unless they clearly appear to be so, with reference to the ultimate results of the suit. If, however, they are clearly impertinent, the court is bound to strike them out at once, but if it be doubtful, they must be left for further consideration. To avoid the mischief of expunging matter which must be brought before its consideration in a future stage, the

Willis v. Childs.

court will hold its hand, and the general order of the court will set the parties right in point of costs at the hearing. 122d Order of 8th May, 1845.

I cannot think that this answer is scandalous, and the only question then is, whether it is impertinent. If that point be doubtful, it would be dangerous to expunge passages; besides, the bill contains interrogatories very nearly approaching those in *Robson v. Lord Brougham*, in which the decision turned on the words "and why;" here we have words nearly equivalent, namely, "for what reason."

These passages excepted to may, possibly, be of importance on the question of costs at the hearing, and I think I ought not on the present occasion, to exclude all future questions, by ordering them to be expunged. On the whole, I do not conceive that there is any scandal in this answer.

I cannot help regretting, that so much time should have been occupied in a discussion as to the relevancy of ten or twelve lines of an answer.¹

WILLIS v. CHILDE.²

March 7 and 28, 1851.

Insufficient Answer — Costs.

Exceptions for insufficiency were heard before the court in the first instance, under Sir G. Turner's Act; the costs of those allowed were set off against those disallowed.

THE plaintiff took fifty-two exceptions to the defendant's answer for insufficiency, and they came on for argument before the court, in the first instance, under 13 & 14 Vict. c. 35, s. 27, (Turner's Act.)

Turner and Renshaw for the plaintiff.

Lloyd, contra, for the defendants.

Seventeen of the exceptions were allowed, one was overruled, and the remaining thirty-four were abandoned.

Under these circumstances a question arose as to the costs of the exceptions.

THE MASTER OF THE ROLLS said he would inquire as to the practice.³

¹ By the 15 & 16 Vict. c. 86, s. 17, the practice of excepting for impertinence is abolished.

² 13 Beavan, 454.

³ See 61st Lord Bacon's Orders, Beames's Orders, 28, and Sanders's Orders, 117; 28th Order of 1828, Ord. Can. 16; 19th Order of December, 1833, Ord. Can. 49; 1 Daniell's Pr. 743; 1 Smith's Pr. 395; and see *Stent v. Wickens*, 5 De G. & S. 384.

Ex parte Atkinson; In re Atkinson.

March 28. THE MASTER OF THE ROLLS. I have made inquiries of the Masters and Registrars, but I cannot find that there is any certain rule where some exceptions are allowed and some disallowed. The general impression, however, is, that the costs are attributed according to the event.

Lloyd. Then they will be apportioned.

THE MASTER OF THE ROLLS. Yes, the costs of the exceptions which are allowed will be set off against the others.¹

*Ex parte JAMES ATKINSON, In the Matter of JAMES ATKINSON,
a Bankrupt.*²

March 1, 1852.

Leave for Bankrupt to Surrender.

Seemle, that the Commissioner has jurisdiction to accept the bankrupt's surrender after the time fixed by the advertisement; and where the Commissioner considered that he had no such jurisdiction without the leave of the Vice-Chancellor, the Vice-Chancellor gave the leave, although not impressed with any favorable opinion towards the bankrupt, holding the surrender to be for the benefit of the creditors generally.

THIS was the petition of the bankrupt appealing from the refusal of the Commissioner to grant leave to surrender after the expiration of the time appointed for that purpose by the advertisement, under the following circumstances stated in the petition and the affidavit of the petitioner.

On the 9th of September, 1850, the petition for adjudication was filed in the Court of Bankruptcy for the Newcastle-upon-Tyne District.

The advertisement was published in the London Gazette of the 20th of September, 1850, and required the bankrupt to surrender on the 26th of September, and on the 29th of October. Previously to the filing of the petition for adjudication, the petitioner had left his place of business at Newcastle-upon-Tyne for London, where he arrived on the 31st of August, and remained until the 8th of September. On the last-mentioned day he left London for New York, without being aware that any petition for adjudication of bankruptcy was intended to be filed against him.

On the 13th of September, 1850, the petitioner wrote a letter to his son at Newcastle-upon-Tyne, informing him of the petitioner's deter-

¹ It does not appear that any order was drawn up.

² 4 De Gex & Smale, 62.

Ex parte Atkinson; In re Atkinson.

mination of going to New York, and requesting that any communication might be addressed to the petitioner at the Post Office, New York.

On the 10th of October, 1850, he arrived at New York.

On the 20th of October, 1850, the petitioner heard from his wife that he had been made a bankrupt; and the petitioner was not until then aware of a petition for adjudication of bankruptcy having been filed against him.

On the 22d of November he engaged a passage in a sailing-vessel bound to Liverpool, and advertised to sail on the 27th of that month. By reason of wet weather and want of sufficient freight, the vessel did not leave New York until the 5th of December, 1850. On the 26th of December, 1850, the petitioner arrived at Liverpool, and on the 31st of December at Newcastle.

On the 23d of January, 1851, he presented a petition to the District Court, praying for leave to surrender. On the 11th of February the Commissioner gave judgment, declining to make any order in the matter of the petition.¹

Robson supported the petition.

Tripp, for the assignees, opposed it.

THE VICE-CHANCELLOR:—I seldom differ from Mr. Ellison; and when I do, I feel great diffidence in my judgment—a diffidence which every one must feel in differing from such a man. I confess my impression to be, that the 12th section does enable the Commissioner to

¹ The following are the most material parts of the Commissioner's judgment:—

"There is not any provision in the act relating to such a petition as the present. The power to make such an order as the one now brought, has been exercised in innumerable cases, but always by the Lord Chancellor himself, until the appointment of judges in the Court of Review by 1 & 2 Will. 4, c. 56; during the existence of which court, it was exercised by the judges thereof. By section 2 of that statute, the Court of Review was to have (as the court constituted by the Consolidated Act is to have,) "superintendence and control in all matters of bankruptcy;" but the Court of Review was to have also "power, jurisdiction, and authority, to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought by petition, or otherwise, before the Lord High Chancellor." Whatever authority the Lord Chancellor had over matters in bankruptcy, by way of primary jurisdiction, seems to have been transferred to the Court of Review; but when the Lord Chancellor sat in bankruptcy with an appellate jurisdiction, he had, besides, the powers of the office of Chancellor. In *Ex parte Bignold*, 1 De G., 530, *ERSKINE*, Chief Judge, said, the Court of Review could claim no other jurisdiction than what the Lord Chancellor formerly possessed on petition in bankruptcy.

"The power to make an order of this kind is not specially conferred on the commissioners by statute; and as the language of the 12th section of the Consolidation Act is not co-extensive with that of the act which established the Court of Review, the power to make it seems to remain with the Vice-Chancellor, by virtue of what V. C. *SHADWELL*, in *Ex parte Candy*, 1 Macn. 212, called the jurisdiction inherent in the Great Seal, to superintend the acts of every person connected with the commission.

"The Vice-Chancellor has now an original jurisdiction in bankruptcy; while the Lord Chancellor's jurisdiction is appellate only. I do not see any thing in the Bankrupt Law Consolidation Act, 1849, to justify me in making the order, which has always hitherto been made by the superior court."

Ex parte Sturt; In re Gibson.

make such an order as that now sought. It would be very inconvenient if it did not.

But it is not necessary to decide the point, for if the Commissioner has not jurisdiction I consider myself as having it; and that I may give the bankrupt leave to surrender, notwithstanding the advertisement. I give it, not for the purpose of favoring the bankrupt in any respect, or for his sake, but for the sake of the creditors, and because it will do no good to any one to refuse the leave sought.

Therefore, if the Commissioner will take the surrender, I give the leave. The assignees will have their costs out of the estate. I give none to the bankrupt.¹

Ex parte GEORGE STURT, *In the Matter of* EDWARD GIBSON and
GEORGE STURT.²

June 11, 1852.

Certificate — Pledged Short Bill.

A banker, who has pledged a short bill of a customer, is excluded from a certificate.

THE bankrupts had carried on business at St. Alban's as bankers from 1844 to 1847, when the bank stopped payment. In March, 1848, the bankrupt Sturt sued out a fiat against himself, which was annulled; and, in 1849, a joint fiat issued against both bankrupts.

On the application of the bankrupt Sturt for his certificate, it was refused by the Commissioner, whose judgment is reported in Mr. Fonblanque's Reports, Vol. 1, p. 84. The case now came on upon the bankrupt's appeal from that decision.

The facts on which the decision upon the appeal proceeded are thus stated in the Commissioner's judgment:—Next, with respect to the charge relating to the short bill of Messrs. Debenham & Kinder: This bill, which was entered short, was sent up to the Commercial Bank with others, in October, 1847. Upon this subject, Sturt, in his examination, says—"Gibson urged me to send up all the bills we could muster; this bill was produced: I said, we had no right to part with it. He (Gibson) said, 'Send it up.' I thought Gibson was solvent, and that no harm could happen. I now confess my weakness, and the irregularity of the transaction."

Mr. Sturt appeared in person in support of the appeal; and, being questioned by the Vice-Chancellor with respect to the short bill, repeated in substance the statement above set out from the Commissioner's judgment.

¹ See *Ex parte Grant*, 4 De Gex & Smale, 62.

² 4 De Gex & Smale, 49.

Chapple's Case.

THE VICE-CHANCELLOR said, that the conduct of the bankrupt with respect to the short bill rendered it unnecessary to consider the other parts of the case; and that it was impossible to overlook such conduct. The bankrupt could not have reflected upon the nature of it, but had, his Honor was willing to believe, merely acted inconsiderately. Still, the interests of society required that such a case should be strictly dealt with. It fell within a description in the act of parliament, such as to exclude the bankrupt from a certificate.

CHAPPLE'S CASE.¹

April 2, 1852.

Winding-up Acts — Bankruptcy of Contributory — Bankruptcy a Bar to Calls.

A joint-stock company, completely registered, became bankrupt. One of the members of the company had previously been declared bankrupt, and had obtained his certificate. The Master placed the bankrupt's name on the list of contributories, and calls were made by the Master on him for contributions to discharge the liabilities of the company incurred before his bankruptcy:—

Held, on his appeal, that his certificate was a bar to the liabilities to satisfy which the calls were made; and that the bankrupt's name ought to be removed from the list of contributories.

THIS was a motion on behalf of Mr. Chapple, that the decision of the Master, placing his name on the list of contributories of the Merchant Traders' Ship, Loan, and Insurance Association, as a shareholder who had executed the company's deed of settlement in respect of 100 shares, might be discharged, or varied by placing the names of his assignees under his bankruptcy on the list in his place.

The circumstances under which the company was formed, its bankruptcy, and the proceedings under the Winding-up Acts, are stated in the preceding report of Lord Talbot's case.

The following facts, in reference to Mr. Chapple's liability, are alone necessary to be stated.

Mr. Chapple was one of the thirteen persons who executed the deed of settlement of the 5th of April, 1847. He executed in respect of 100 shares, and he paid the deposit in respect of these shares.

At Christmas, 1847, the company was unable to meet its engagements, and ceased to carry on business.

On the 8th of May, 1848, the company was declared bankrupt.

On the 6th of November, 1848, Mr. Chapple, who continued to be the holder of 100 shares in the company, was declared bankrupt;

¹ 5 De Gex & Smale, 400.

In re Wise; Ex parte Wise.

and he obtained his certificate of conformity on the 11th of January, 1849.

Bacon and *Hoare*, in support of the motion, cited *Kuper's Assignees' case*, 3 De G. & S. 113; and see *Ex parte Brown, Re Fenwick*, 3 De G. & S. 590.

Roxburgh and *Morris*, for the official manager, cited *The South Staffordshire Railway Company v. Burnside*, 5 Exch. 129; and *Thompson v. The Universal Salvage Company*, 13 Jur. 104. They also referred to the Bankrupt Law Consolidation Act, 1849, s. 177.

THE VICE-CHANCELLOR. I consider Mr. Chapple is not liable as a contributory. The company became bankrupt in May, 1848. Before that time the company had incurred liabilities; and for these no doubt Mr. Chapple was liable to contribute before his bankruptcy: but these liabilities were clearly barred by his certificate. If, after his certificate had been obtained, a suit had been instituted against him and the other shareholders, to enforce the liabilities of the company, it appears to me that he could have pleaded his certificate in bar of the suit. The Winding-up Acts have only appointed another mode of enforcing the liabilities of the members of the company. The calls now made on Mr. Chapple were in respect of a contribution really payable by, or due from him, before the date of his bankruptcy. His certificate is a bar not to these calls *quod* calls, but to the liabilities to satisfy which the calls were made. I am of opinion that Mr. Chapple's name ought to be removed from the list of contributories. The costs of all parties must be paid out of the estate.

In the Matter of LEWIS LOVATT AYSHFORD WISE, an infant; and in the Matter of the Trustee Act, 1850; *Ex parte* JOHN AYSHFORD WISE.¹

March 20, 1852.

Mortgage of Copyholds, with Power of Sale.

Copyhold premises were surrendered in 1829, by a debtor, to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators, or assigns, should sell the same, and out of the proceeds should pay to himself, his executors or administrators, 200*l.* then due, and interest. The creditor died in 1831. In 1851 his personal representative contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, that there was no personal representative, and that proof of the title of the customary heir would be very expensive. The court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor.

¹ 5 De Gex & Smale, 415.

In re Wise; Ex parte Wise.

At a court baron, held in 1829, in and for the manor of Newcastle-under-Lyne, Samuel Smith surrendered into the hands of the lord a plot of copyhold or customary land, situate in Shelton, to the use and behoof of Hugh Booth, Esq., his heirs and assigns, forever, at the will of the lord of the manor, according to the custom thereof, upon trust, that he the said Hugh Booth, his heirs, executors, administrators, or assigns, should, at any time or times thereafter, when and as soon as he or they should think proper or convenient, and without any further or other occurrence of or on the part of the said Samuel Smith than is therein contained, make sale and absolutely sell and dispose of the premises as he or they should see fit; and with the moneys arising from such sale, and the rents in the mean time, should pay certain costs and expenses, and then should pay to himself and themselves the principal sum of 200*l.* then due from Samuel Smith to Hugh Booth, with interest; and, after such payment, should pay the residue of the money to the said Samuel Smith, his executors, administrators, and assigns; and the said Samuel Smith did thereby declare that the receipts of Hugh Booth, his heirs, executors, or administrators, should be good and sufficient discharges to the purchasers for the money in such receipts to be expressed to be received.

Hugh Booth died on the 10th of October, 1831, intestate, leaving Mary Lovatt Booth, his only child, his heiress at law, and heiress according to the custom of the said manor, him surviving.

In March, 1833, letters of administration to the estate of Hugh Booth, during the minority of M. L. Booth, were granted to the Reverend E. Whitby, her guardian.

On the 28th of March, 1837, M. L. Booth was married to Joseph Ayshford Wise.

Mrs. Wise having attained twenty-one, letters of administration to Hugh Booth were granted to her.

Mrs. Wise died on the 6th of May, 1844, leaving her son, Lewis Lovatt Ayshford Wise, an infant, her heir at law and customary heir, her surviving; and on the 23d of July, 1846, letters of administration to the estate of Hugh Booth, unadministered by Mrs. Wise, were granted to Mr. J. Ayshford Wise, her husband.

Mr. J. Ayshford Wise, in exercise of the trust for sale contained in the surrender of 1829, entered into a contract, in writing, dated the 13th of September, 1851, whereby he agreed to sell to Mr. Ephraim Edwards, and Mr. Ephraim Edwards agreed to purchase, at the sum of 100*l.*, the premises surrendered by Samuel Smith; and it was agreed that 70*l.*, part of the purchase-money, should be paid on the execution of the agreement, and the remainder thereof to be paid to J. Ayshford Wise upon the premises being surrendered to the use of Ephraim Edwards. And it was further agreed that J. Ayshford Wise should procure the necessary order to enable his infant, Lewis Lovatt Ayshford Wise, the customary heir of the said Hugh Booth, in whom the legal estate in the premises was then vested, to surrender the copyhold premises to the use of Ephraim Edwards, his heirs and assigns.

This was the petition of Mr. J. Ayshford Wise, presented under

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the Trustee Act of 1850, praying that the court would make an order vesting the copyhold premises in the purchaser.

It appeared that Samuel Smith had died intestate, that his customary heir had since died intestate, and that there was no personal representative, and that the proof of the title of the present customary heir would be attended with considerable expense.

C. M. Roupell, in support of the petition. The surrender was not strictly a mortgage, but a trust for sale. It is unnecessary to serve the customary heir with notice of this application. If any person, representing the mortgagor, should be served with this petition, it should be his personal representative; but the mortgage was for 200*l.*, and the sale of the entire property was for 100*l.* There could be no necessity for serving him.

THE VICE-CHANCELLOR considered that the order might be made without service of any notice on either the customary heir or the personal representative of S. Smith the mortgagor.

WILLIAMSON v. PARKER.¹

March 31, 1852.

Practice — Absent Parties.

In an administration suit by a single plaintiff, where an inquiry was directed in the decree as to the persons entitled to the residue, and the Master made a report finding a great number of persons — nephews and nieces, and descendants of nephews and nieces — answering the descriptions in the testator's will, and consisting in part of married women and infants, and persons out of the jurisdiction, the court declared the rights of the parties, without a supplemental bill being filed to bring them before the court.

Form of the order as made.

THE testator, John Seton, by his will, dated the 27th of June, 1814, gave his residuary personal estate to his wife, for her life, and, on her death, to all his nephews and nieces, the children of his three sisters, Agnes, Henrietta, and Ann, living at the death of his wife; and if any of the nephews and nieces should die in the lifetime of the wife, leaving lawful issue, such issue to stand in the place of the parent; with other provisions as to the issue attaining twenty-one.

The testator died in 1818; his wife, having survived him, died on the 11th of February, 1846.

The plaintiff, claiming to be a grandson of Agnes, filed his bill on the 19th of April, 1847, and prayed the usual accounts in an administration suit.

¹ 5 De Gex & Smale, 419.

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The defendants were the trustees, and two of the issue of a deceased granddaughter. The decree, made on the 3d of July, 1847, directed the Master to inquire who were the nephews and nieces and issue, adopting the words of the will.

The Master made his report on the 5th of September, 1851, naming upwards of 100 persons as coming within the terms of the inquiry.

The cause now came on upon further directions on the Master's report, but without any supplemental bill having been filed, to bring the parties mentioned in the Master's report before the court.

Stuart and Bates, for the plaintiff.

Swanston and *Steere*, for the defendants, the trustees, submitted to the court that the persons named in the Master's report, as coming within the terms of the inquiry, should be brought before the court, to contest with the plaintiff the questions arising on the testator's will.

Gordon appeared for seventy-five of the persons named by the Master

Nalder appeared for some other of these persons.

Shebbeare appeared for other of these persons.

Swanston and *Steere* submitted, for the consideration of the court, whether it had jurisdiction, on a mere gratuitous appearance, as in the present case, for classes of persons of whom some were infants and some were married women; and whether an order made under such circumstances would be an indemnity and protection to the trustees.

THE VICE-CHANCELLOR said, he would hear counsel for the several persons appearing, on the questions raised as to the construction of the will.

Counsel were accordingly heard on the questions as to the construction of the will.

THE VICE-CHANCELLOR said, there did not appear to be any question on the will, which the court could not just as well determine on the appearance of the parties by counsel, as by bringing them before the court by a supplemental bill; and he was disposed to make a decree without requiring any supplemental bill to be filed.

The order on further directions, dated the 31st of March, 1852, after referring to the decree, 3d of July, 1847, and the Master's report, 5th of December, 1851, proceeded thus: "and the following persons [naming a great number of the persons from the report,] by their counsel appearing and consenting to be bound by this order; and it appearing by the said Master's said report that Thomas M'Kenzie, Elizabeth M'Kenzie, Jane M'Kenzie, and John M'Kenzie, the only

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four surviving children of the testator's nephew Peter, otherwise Peter Seton M'Kenzie, are out of the jurisdiction of this court," made a declaration in the following terms: — "This court doth declare that the grandchildren and remoter descendants of the nephews and nieces of the testator, John Seton, are not entitled to any interest in his residuary estate under his will; and doth also declare that the residue of the estate of the said testator is divisible into seven equal parts or shares; and that the plaintiff, James Williamson, is entitled to one of such equal seventh shares, as only surviving child of the testator's said niece, Betty, otherwise Elizabeth Williamson, in the said report mentioned; and that Agnes Hyslop, the wife of Robert Hyslop, and Betty Charteris, widow, in the said report respectively mentioned as surviving children of the testator's said niece, Margaret Hyslop, are entitled as joint tenants to one other of such equal seventh shares; and that Isabella Booklass, the wife of James Booklass, as only surviving child of the testator's niece, Henrietta MacCall, is entitled to one other of such equal seventh shares; and that William Brown, Elizabeth Brown, and Thomas Brown, as the only three surviving children of the said testator's nephew, James Brown, are entitled as joint tenants to one other of such equal seventh shares; and that Dugald Stewart Williamson, as the only surviving child of the testator's said nephew, John Williamson, is entitled to one other of such equal seventh shares; and that Alexander Young and John Young, as the only surviving children of the testator's said niece, Elizabeth Young, are entitled as joint tenants to one other of such equal seventh shares; and that Thomas M'Kenzie, Elizabeth M'Kenzie, Jane M'Kenzie, and John M'Kenzie, as the only four surviving children of the testator's said nephew, Peter Seton M'Kenzie, are entitled as joint tenants to one other of such equal seventh shares."

The order then gave the usual directions for taking an account of the real and personal estate of the testator, and proceeded as follows: —

"And it is ordered, that the plaintiff's bill do stand dismissed out of this court as against the defendants, Joan M'Gill and Elizabeth, his wife, Isabella Hewetson, and Margaret Hewetson, with costs, to be taxed by the Taxing Master of this court in rotation; And it is ordered, that such costs, when taxed, be paid to the said defendants by the plaintiff; And it is ordered, that what he shall so pay be added to his costs of these suits; And it is ordered, that the said Agnes Hyslop, Betty Charteris, Isabella Booklass, William Brown, Thomas Brown, and Elizabeth Brown, and the said Alexander Young, and John Young, and Dugald Stewart Williamson, be at liberty to attend before the said Master in taking the aforesaid accounts, and in all other proceedings in this cause, in the same manner as if they were parties to this cause; And it is ordered, that the said Taxing Master do tax the costs of all parties to these suits, including the costs of the said Agnes Hyslop, Betty Charteris, Isabella Booklass, William Brown, Thomas Brown, and Elizabeth Brown, and the said Alexander Young, and John Young, and Dugald Stewart Williamson, of making out and supporting their claims in the Master's office prior to the hearing of these causes on further directions, and also of their

Norbury's Case.

appearance this day, and such other costs as they would be entitled to in case they had been parties to these suits from the beginning, such costs to be taxed as between solicitor and client."

And the decree contained the usual directions for the production of deeds and papers, and the reservation of further directions, and liberty to apply.

In the Matter of the MIDLAND UNION, BURTON-UPON-TRENT, ASHBY DE LA ZOUCH, and LEICESTER RAILWAY COMPANY; and In the Matter of the WINDING-UP ACTS, 1848 and 1849: Case of the Administratrix of NORBURY, deceased.¹

April 16 and 19, 1852.

Winding-up Acts — Contributory.

A member of the committee of management of an abortive railway company attended many of the meetings, but he did not attend the only meeting at which the only unsatisfied debt of the company (being a debt to its engineer) was contracted; he, however, attended a subsequent meeting, at which the report of the engineer was received and adopted:—

Held, that, *prima facie*, the claim of the engineer was a liability of the company within the meaning of the Winding-up Acts; and that, although the member was not directly liable to the engineer, he was liable to the persons liable to the engineer to contribute ratably with them; and the member's name was retained on the list of contributories.

THIS was a motion by way of appeal from the order of the Master, who had placed the name of Mrs. Hill, as administratrix of Mr. Norbury, on the list of contributories.

The company consisted of persons who contemplated the formation of a railway.

The circumstances under which the company was formed, and the acts of the members, and particularly of Mr. Norbury, are stated in the judgment of his Honor. The following additional statements may be usefully made:—

The company, having been formed in 1845, Mr. Norbury was a member of the provisional committee, a numerous body; he was also a member of a select body, consisting of ten persons, called the committee of management, who superintended all the arrangements of the company. This select body gave all orders and originated all proceedings; Mr. Norbury was a frequent attendant at the meetings of this body.

At a meeting of this committee of management, held on the 17th of October, 1845, it was resolved, that 500 shares be the maximum number to be allotted to each member of the committee of management.

¹ 5 De Gex & Smale, 423.

Norbury's Case.

At another meeting of the committee of management, held on the 28th of the same month, it was resolved, "that the whole number of shares, with the exception of those originally reserved for the provisional committee, be allotted to the public."

Mr. Norbury was not present at the former of the above meetings, but he was present at the latter meeting.

At another meeting of the committee of management, Mr. Vignoles was appointed the engineer of the company.

Mr. Norbury attended a meeting of the committee of management, held on the 29th of the same month, at which the report of Mr. Vignoles, an engineer, who had made a preliminary survey of the line, was read. It was as follows:—"Sir, I have the satisfaction of reporting to you for the guidance of the board, that the progress made in the parliamentary survey is such, that I am now able to assure you, that the whole of the necessary plans and sections will be completed in good time for lodgment, on the 29th of November. I am, Sir, your faithful servant,

C. VIGNOLES, Engineer.

WILLIAM KNIGHT, Esq.,
Sec. Midland Union Railway."

This report having been read, a resolution in the following terms was passed:—"That the report of the company's engineer, Mr. Vignoles, this day received by the secretary, be entered on the minutes, and published in the usual morning papers of to-morrow, and in the railway weekly papers, under the direction of Mr. Baxter."

Some shares in the company were allotted, but not to the members of the provisional committee. Deposits were paid upon the allotted shares. The project was abandoned in the year 1845.

Mr. Vignoles claimed a sum of 2,635*l.* against the company. The committee of management requested Mr. Baxter, the solicitor to the projected company, to arrange the amount with Mr. Vignoles; and Mr. Baxter, after some negotiation, arranged the claim, and paid 1,300*l.* to Mr. Vignoles, in full for his demand, out of his own moneys; and the company never repaid that sum to Mr. Baxter.

Mr. Norbury died in August, 1849.

The Master charged with winding up the company placed the name of Mrs. Hill, as the administratrix of Mr. Norbury, on the list of contributories.

Hobhouse, in support of the motion, cited *Besly's case*, 3 De G. & S. 224; 2 Mac. & G. 176; 3 Id. 287; *Glaholme's case*, 1 De G. & S. 583, and *Hutchinson's case*, 1 De G. & S. 563, and submitted, that the only liability remaining, and that a disputed one, being the amount paid to Mr. Vignoles, it followed, from the cases cited, that Mr. Norbury had incurred no liability to Mr. Vignoles; and that he was not liable to be treated as a contributory, except in so far as he was liable to pay that debt; and that, not being liable to pay that debt, he was improperly placed on the list as a contributory. But there was an objection including the former objection, namely, that no expenses whatever had been incurred since the 29th of October, 1845; and he

Norbury's Case.

submitted that the statute of limitations would apply, and that there was no liability, in respect of which any contributory could be placed on the list of contributories.¹

Roxburgh, for the official manager, referred to *Carriek's case*, 1 Sim. (N. S.) 505, and *Capt. Tunner's case*, 5 De G. & S. 182.

The court deferred judgment.

THE VICE-CHANCELLOR: This is an appeal against an order of the Master, placing upon the list of contributories the name of Mrs. Hill, as administratrix of Mr. Norbury. The question is, whether Mrs. Hill, as administratrix, is a person in any way liable to contribute to the payment of the debts, liabilities, or losses of the company. The evidence before the Master was scanty; but I think the Master has come to a right conclusion upon the evidence, and that Mrs. Hill is rightly put upon the list as a contributory.

The company, in this case, consisted of persons who contemplated the formation of a railway company. The project was abandoned before any great progress was made towards the formation of the company; but I am bound by the authorities upon this subject, and, indeed, by the order on which the present proceeding is taken, to assume that this is a company to be wound up within the meaning of the Winding-up Acts. A numerous body of persons were appointed to act as the provisional committee of the company. From among these, ten persons, including Mr. Norbury, were formed into a committee of management. The committee of management appear to have acted in the usual way. They held frequent meetings for transacting business, with a view to the formation of the company. At these meetings orders were, from time to time, given by persons present. Resolutions were passed and expenses incurred, and regular minutes appear to have been kept of meetings; and Mr. Norbury appears to have attended at several of those meetings, at which it seems orders were given for expenses to be incurred.

At a meeting of the committee of management, Mr. Vignoles was appointed engineer of the company, and he was directed to make the surveys, then necessary, for an application to parliament; and a minute was then entered to that effect. Mr. Norbury was not present at that meeting; but it appears that he was present at a subsequent meeting, held on the 29th of October, 1845, at which the appointment of Mr. Vignoles, as the company's engineer, was arranged — a report made by him as to the progress of his surveys was directed to be entered on the minutes, and advertised in the newspapers by Mr. Baxter, the company's solicitor.

In respect of his employment as engineer, Mr. Vignoles afterwards brought in a demand against the company, which, under the sanction

¹ As to the effect of the Statute of Limitations under the Winding-up Acts, see *Wryght's case*.

Norbury's Case.

of a meeting of provisional directors, was compromised; and a sum of 1,300*l.* was paid by Mr. Baxter, the solicitor, to Mr. Vignoles, as in full of his claim. Mr. Baxter states that this sum of 1,300*l.* is still due to him; and I consider that, *prima facie*, (subject of course to investigation as to the propriety of this payment,) the amount due to Mr. Vignoles, and what was properly paid by Mr. Baxter in satisfaction of that claim, is a debt or liability of the company within the meaning of the Winding-up Act; and the question is, whether it is a debt or liability of the company towards which this gentleman, Mr. Norbury, is liable to contribute.

Lord Cranworth very distinctly says in *Carrick's case*, 1 Sim. (N. S.) 509, "Who, then were, at the time of the passing of the act, the persons liable to pay the debts incurred in the attempt to form the company? Evidently, those who had given the orders under which the debts were incurred, or who have sanctioned the giving of such orders by others. No one could be liable, unless the creditor could say to him, my debt was incurred under an order given or sanctioned by you, or unless the party liable to the creditor could say to him, I incurred this obligation under your engagement to contribute ratably with me."

It is possible, in that case, Mr. Vignoles would not have said, following Lord Cranworth's language, that his debt was incurred under an order given or sanctioned by Mr. Norbury, because Mr. Norbury was not a party to the order; but, I think that the parties who are liable under that order, could undoubtedly say to Mr. Norbury, that they incurred that obligation under his engagement to contribute ratably with them.

Just consider how it is. Here are ten gentlemen, who form themselves into a committee of management for this project. They meet from time to time, and orders are given. The meeting of to-day acts on the orders of yesterday, and carries them out. What is the law? Is the law, that those gentlemen only who are legally liable on the orders given are liable eventually, and can have no claim over for contribution from others? Is it not obvious, when gentlemen associate together for an object of that kind, that, necessarily as it appears to me, the law must imply a contract between themselves, that they shall contribute ratably towards the expenses which are incurred under orders which are not given by themselves, or immediately sanctioned by themselves, but which are acted upon and carried out by those who were present from time to time.

I cannot entertain a doubt, that, under the circumstances of this case, a contract is to be implied among these ten persons, that they were to contribute ratably towards the expenses incurred under the resolutions of the body of which they formed apart; and therefore it appears to me that the Master came to a right conclusion.

The appeal was dismissed, with costs.

Dinn v. Grant.

DINN v. GRANT.¹

April 23, 1852.

Vendor and Purchaser — Lien — Contract Failing by Purchaser's Default — Claim.

A hotel keeper, who was also the owner, agreed, on the 24th of March, 1851, to sell his hotel, and to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife (who was the hotel keeper's daughter) went on the premises and assisted in managing the concern. From the purchaser's letters, it appeared that he was not able to supply the funds necessary to carry on the business; and in a letter of the 24th of May, 1851, he wrote thus to the hotel keeper: "You must mortgage or sell the premises." He subsequently asked the hotel keeper to give him a mortgage on the hotel, for sums which he claimed to be due to him, and brought an action against the hotel keeper, for, among other things, a remuneration in respect of the services of his (the purchaser's) wife above-mentioned. The hotel keeper became bankrupt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract:—

Held, that although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default; yet that, as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, and his claim was dismissed.

HENRY DINN, by his claim, stated the following agreement:—

"Memorandum of an agreement made between William Boyce, of the Victoria Hotel, Dover, and Henry Dinn, of 28 Park Road, Chapham Road, Surrey: In consideration of certain moneys which have been advanced by Henry Dinn to William Boyce, the said William Boyce agrees to sell, and the said Henry Dinn agrees to purchase, the Victoria Hotel, the house adjoining, and the ground in Russell street, for the price of 2,900*l*. Mr. W. Boyce agrees to remain, and assist in carrying on the business for the first two years, for which he is to receive half the profits, which is to be ascertained at the expiration of each year; at the expiration of two years Mr. Boyce to have the option of taking the premises again, on repaying Henry Dinn all moneys he may have paid and laid out in the business, or advanced to or for Mr. Boyce, and also one half the increased value of the said hotel, house, and premises, over and above the 2,900*l*; but should Mr. Boyce decline the purchase, then the purchase-money to remain out for seven years, at 5*l*. per cent. per annum. In case of disputes, matters to be referred to arbitration.

"24th March, 1851.

WILLIAM BOYCE,
HENRY DINN."

The claim proceeded to state, that, at the date of the agreement, the sum of 277*l*. 9*s*. 4*d*. had been advanced by the plaintiff to Mr.

¹ 5 De Gex & Smale, 451.

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Boyce; and that, after the date of the agreement, the plaintiff had, in reliance on the faith of the agreement, advanced further sums, amounting to 63*l.* 18*s.* 2*d.*, in part satisfaction of the purchase-money of 2,900*l.*; but that before Boyce had performed the agreement on his part, he became bankrupt, in December, 1851, and that the defendants, Thomas Grant, and Edward Edwards, were the assignees of his estate and effects. The plaintiff claimed that the assignees might elect either to specifically perform the agreement or to abandon the same, and to repay to the plaintiff the sums of 277*l.* 9*s.* 4*d.* and 63*l.* 18*s.* 2*d.*, with interest; and in case the defendants should elect specifically to perform the agreement, then the plaintiff claimed to be entitled to a specific performance thereof, he offering specifically to perform the same; but, if the defendants should elect to abandon the agreement, then the plaintiff claimed to be entitled to a lien upon the premises comprised in the memorandum of agreement for the two sums, with interest, and to be paid the two sums and his costs; and in default thereof, he claimed to have the premises sold, and the produce thereof applied towards payment of the two sums, and his costs.

The plaintiff proved the case stated by his claim.

On behalf of the defendants, Boyce deposed, in effect, that the memorandum was considered by him to be a mere note, on which terms were ultimately to be arranged; that, from the 5th of April to the 3d of September, 1851, the plaintiff's wife, who was a daughter of Boyce, had, against the remonstrances of Boyce, acted in the management of the business, and that she had left in consequence of quarrels. Mr. Boyce also produced a number of the plaintiff's letters to him, from which it appeared that the plaintiff had not the means of supplying the necessary funds to carry on the business, and, amongst others, he produced a letter dated the 24th of May, 1851, from the plaintiff to Mr. Boyce, containing the following passage: "You must mortgage or sell" the premises. By another letter of the 17th of June, 1851, the plaintiff claimed to be a creditor of Mr. Boyce in the amount of 418*l.* 12*s.* 6*d.*, and asked for a mortgage of the Victoria Hotel, to secure the amount.

In October, 1851, the plaintiff brought an action against Mr. Boyce for the whole balance due to him, in respect of (among other things) the services of the plaintiff's wife from the 3d of April to the 24th of October, 1851, charged at 50*l.*

Russell and *Haldane* for the plaintiff. The plaintiff is entitled to the specific performance of the agreement; or to a declaration that the moneys which the plaintiff had advanced on the faith of the contract, should be declared to be a lien on the property in the hands of the defendants.

In *Mackreth v. Symmons*, 15 Ves. 329, 245, Lord Eldon, citing *Bargess v. Wheate*, 1 W. Bl. 121, 123, with approbation, says, that in that case Sir Thomas Clarke had laid down the rule as to vendor and vendee thus: "Where conveyance is made prematurely before money paid, the money is considered as a lien on that estate in the hands of the vendee; so, where money was paid prematurely, the

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money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser."

Malins and Bigg, for the defendants. All the correspondence shows, that the plaintiff was without means to perform the agreement of the 24th of March, 1851, and the letter of the 24th of May, 1851, telling Mr. Boyce that he must mortgage or sell the property, the subject of the contract, is so utterly inconsistent with the notion of the existence of a binding contract, that it must be taken as conclusive evidence that it was then abandoned. Next, as to the alleged lien. If the contract was abandoned by the purchaser, then he has no right of lien; and the defendants submit, that the letter of the 24th of May, 1851, is an abandonment by him of the contract; or, if that letter were not sufficient, then the letter of the 17th of June, 1851, and the action, terminated the contract, and treated the money advanced as a debt from Mr. Boyce. They cited *Ewing v. Osbaldiston*, 2 My. & Cr. 53, 88.

Russell, in reply, contended, that the lien, having once attached, was continued, especially under the circumstance, that the plaintiff had not retired from, but that Boyce had refused or was unable to perform, the contract.

THE VICE-CHANCELLOR, after stating the claim, said:—I will assume that this was an agreement to the specific performance of which the plaintiff was entitled, and that he would have been entitled to a lien if the contract had failed in consequence of the vendor's default. The plaintiff, however, appears never to have been able to carry on the business; and his conduct from the 24th of May, 1851, is quite inconsistent with the agreement being in existence at that time. In his letter of that date, the plaintiff writes in a manner indicating that he considered he was not under any obligation by reason of the agreement. From that time all notion of any agreement being in force appears to have ceased; and from that time the plaintiff treated Boyce as being personally liable for sums expended, for which, if they had been expended on the footing of the agreement, there would have been no personal liability in Boyce. The action which the plaintiff brought against Boyce is inconsistent with any liability in him, specifically, to perform the agreement of the 24th of March, 1851. It appears to me that the obvious conclusion is, that the plaintiff cannot have any part of the relief he asks, and the claim must be dismissed, with costs.

Ware v. Polhill.

WARE V. POLHILL.¹

April 24, 1852.

Land Tax — Redemption by Guardian of Infant — Effect of a Declaration by Court — Personal Estate.

The guardian of an infant tenant in tail redeemed the land-tax on the estate, but made no declaration, in pursuance of the 38 Geo. 3, c. 60, so as to make the land-tax a charge on the inheritance. In a suit by the guardian, who was also administrator of the infant tenant in tail, it was declared, that the land-tax was an annuity or rent charge in favor of the infant's personal estate; and the court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land-tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail, the personal representative of the infant claimed the benefit of the decree against the inheritance:—

Held, that the declaration effectually charged the inheritance; and (the legal charges executed by the tenant for life and tenant in tail having failed,) the tenant in remainder, after the determination of these estates, was directed legally to charge the estate with the annuity.

THIS cause arose out of the directions contained in a decree made in 1805, by Lord Eldon, in the cause of *Ware v. Polhill*, 11 Ves. 257.

The guardian of Nathaniel Polhill, an infant tenant in tail of an estate, had, in 1799, without authority, applied part of the infant's personal estate in purchasing the land-tax, which was chargeable in four distinct sums on the entailed estate² but she had not complied with the provisions of the statute 38 Geo. 4, c. 60, by which she was enabled to create a legal charge on the estate for the absolute benefit of the infant's estate, as against his estate in tail, by declaring the option as provided for by that act.

The infant tenant in tail subsequently died under age, and his guardian became his administratrix.

On the cause coming on in 1805, before Lord Eldon, on further directions, it was declared that the plaintiff in that suit, the administratrix of the infant, Nathaniel Polhill, was entitled, as part of the personal estate of the deceased infant, to four several annuities or rents charge, to be charged on and issuing out of the settled hereditaments (describing them,) to the several amounts of the land-tax redeemed thereon respectively, the same annuities to be redeemable by any person having or being entitled beneficially to any estate in succession, remainder, or expectancy, under the will of Nathaniel Polhill, the testator in the cause; and the court directed that proper deeds for securing the annuities should be settled by the Master, to be executed by the tenant for life and by the tenant in tail in remainder of the estates, on his attaining the age of twenty-one years. Indentures of lease and release were accordingly settled, and were executed by

¹ 5 De Gex & Smale, 455.

² See stat. 38 Geo. 3, c. 60; stats. 39 Geo. 3, cc. 21, 40, 43, 108; stat. 39 & 40 Geo. 3, c. 30; and stat. 41 Geo. 3, c. 72, consolidated and amended by stat. 42 Geo. 3, c. 116.

Ware v. Polhill.

the tenant for life, and, on the tenant in tail attaining twenty-one, by him charging the estate with the annuities accordingly; but no recovery was directed by the decree to be suffered, and no recovery was, in fact, suffered, so as to render the annuities a legal charge upon the fee simple. The tenant in tail survived the tenant for life, and died in 1828; and upon his death the person claiming in remainder to the remainder-man in tail, who had executed the charge, declined to pay the annuity, insisting that there was no charge on the estate in respect of the annuities. The administratrix having died, letters of administration *de bonis non* of Nathaniel Polhill were granted to Mr. Ware, who instituted the present suit to enforce the payment of the annuities from the persons who had become seised of the estates.

Glasse and *Ware* appeared for the plaintiff.

Willcock and *Bird*, for the defendants.

The judgment of the court in the case of *Ware v. Polhill*, 11 Ves. 257, 281, and the terms of the decree in that cause, were referred to; and the following cases, *Kirkham v. Smith*, Amb. 518; *Cockburn v. Thompson*, 16 Ves. 321; *Fox v. Crane*, 2 Vern. 306; *Lloyd v. Jones*, 9 Ves. 65; *Blundell v. Stanley*, 3 De G. & S. 433; *Lay v. Lane*, Cr. & Ph. 305, were cited in the course of the argument.

THE VICE-CHANCELLOR. If the trustee and guardian of the infant, when she effected the purchase of the rent-charge, had complied with the provisions of the 38 Geo. 3, c. 60, the land-tax would have been a legal charge, by virtue of the act, upon the estates. Lord Eldon intended, by the decree, to give a charge on the estate, as nearly equivalent as he could to the legal charge, which would have been obtained under the act; and he directed deeds to be executed, to give effect to this intention; but the parties did not comply with the direction, and, they not having done so, this bill was filed. The decree contained a declaration effectually charging the estates with these annuities; but the direction, which was to give effect to this declaration, was not properly complied with. Now, the annuities remained an equitable charge by force of the decree, the effect of which is to bind the inheritance for ever.¹ The declaration now to be made, must be to that effect; and there must be a direction, that all parties shall do and execute all proper acts and conveyances. The plaintiff is entitled to the costs of the suit, but he must pay the costs of the necessary deeds.

¹ As to merger of land-tax purchased by a guardian of an infant tenant in tail, see *Blundell v. Stanley*, 3 De G. & S. 433.

IN the Matter of THE TRUSTS OF THE ESTATE OF BENJAMIN BIDDULPH, deceased; and in the Matter of THE TRUSTS OF JANE POOLE, a person Deaf, Dumb, and Blind; and in the Matter of THE ACT FOR THE RELIEF OF TRUSTEES.

April 19 and 24, 1852.

Petitioner, Deaf, Dumb and Blind — Income only given.

A deaf, dumb, and blind person petitioned for payment to herself of 7,000*l.*, carried to her separate account: —

Held, that she might be a petitioner without a next friend; but the court declined, without special reasons assigned, to make an order for payment of more than the income for her benefit.

Form of the order.

THE above-named Jane Poole presented her petition in the above matters; from the statements in which the following are collected: —

Benjamin Biddulph, deceased, departed this life in the month of June, 1849, leaving Penelope Gordon, widow, Harriett Woodyatt, widow, Frances Middleton, widow, Caroline Stevenson, widow, Mary Anne Poole, and the petitioner, his next of kin, him surviving. Administration of the estate and effects of the deceased were granted to the said Caroline Stevenson.

By a decree, dated the 12th of July, 1851, in a cause in which Mary Anne Poole and the petitioner, by their next friend, Charles Benjamin Stevenson, the son of Mrs. Stevenson, were plaintiffs, and Mrs. Stevenson was defendant, the petitioner had become entitled to one eighth of the residuary personal estate of the deceased, after certain payments agreed to be made thereout in the first instance; and in respect of such one eighth the sum of 7,000*l.* was, under the provisions of the Trustee Act, 1850, paid by Mrs. Stevenson, as the administratrix, into the Bank of England, to the account of the Accountant-General of the Court of Chancery, "In the Matter of the Trusts of Jane Poole, a person deaf, dumb, and blind," meaning the petitioner, who was born deaf and dumb, and who had become blind about nine years since.

After the payment by Mrs. Stevenson, and on the 15th of July, 1851, Mr. Charles Benjamin Stevenson, as the next friend of the petitioner, presented a petition in her name, in the above matters, on which an order was made by the Vice-Chancellor, Knight Bruce, on the 9th of August, 1851; by which it was ordered, that the 7,000*l.* cash in the bank, on the credit of the matter entitled "In the Matter of the Trusts of Jane Poole, a person deaf, dumb, and blind," should be laid out in the name of the Accountant-General, in the purchase of bank 3*l.* per cent. annuities, in trust in the matter, subject to the further order of

the court. And it was ordered, that, out of the dividends to accrue on these bank annuities, when purchased, the sum of 100*l.* per annum, half yearly, should be paid to Mrs. Stevenson, during the life of the petitioner, or until the further order of the court, she undertaking to apply the same towards the maintenance of the petitioner; and it was ordered, that the residue of the dividends, to accrue upon these bank annuities, should, with all accumulations, be laid out in the purchase of like bank annuities to the like account, subject to the further order of the court.

This sum of 7,000*l.* was, pursuant to the order, invested by the said Accountant-General in the purchase of the sum of 7,235*l.* 2*s.* 10*d.* bank 3*l.* per cent. annuities; and these annuities, with the sum of 56*l.* 16*s.* 5*d.* cash, being the residue of the dividends which accrued due thereon on the 5th of January, 1852, after the receipt by Mrs. Stevenson of the sum of 50*l.*, by the order directed to be paid to her, were, at the date of the petition, standing in court in trust, in the matter entitled "In the Matter of the Trusts of Jane Poole, a person deaf, dumb, and blind."

The present petition alleged that the petition of the 15th of July, 1851, had been presented, and that the order had been obtained, without the knowledge of, or any previous communication with, the petitioner; and that it was an unauthorised interference with the property and concerns of the petitioner, and had occasioned to the petitioner extreme annoyance and considerable pecuniary embarrassment; and the petition proceeded to set forth, that the petitioner, during the life of the intestate, Benjamin Biddulph, who was a trustee for the petitioner of certain sums of stock and other property, had been in the receipt of, and had the entire control over, her own income and moneys; and that Mrs. Stevenson never had been in the receipt of the income or moneys, except during the period which had elapsed since the decease of Mr. Biddulph, who was a trustee for the petitioner of certain sums of stock and other property; had been in the receipt of, and had the entire control over, her own income and moneys; and that Mrs. Stevenson never had been in the receipt of the income or moneys, except during the period which had elapsed since the decease of Mr. Biddulph, and in the character of his legal personal representative; and that Mrs. Stevenson had refused to pay into the hands of the petitioner, and upon her receipt, the moneys which she had received on her behalf; and that by reason and in consequence of such refusal, the petitioner had been compelled, for her necessary expenses, to realize a portion of her funded property; and that she was indebted for rent and servants' wages, and otherwise for expenses of her maintenance and establishment, in a considerable sum; and that the petitioner was advised that she was entitled to have, and that she was desirous of having, the uncontrôled dominion over her own property.

The petition prayed that the order of the 9th of August, 1851, might be discharged, and that the petition, upon which the same had been made, might be dismissed, and for a taxation of the petitioner's costs occasioned by that order, and of and incidental to the present application; and that the same might be raised by the sale of a competent

part of the sum of 7,235*l.* 2*s.* 10*d.*, bank 3*l.* per cent. annuities, standing in trust in the above matter; and that the residue of these annuities, with the said sum of 56*l.* 16*s.* 5*d.* cash, together with any further dividends which might accrue due on these annuities, might be transferred and paid to the petitioner; and that Mrs. Stevenson might be ordered to pay to the petitioner the sum of 50*l.* received by her under the order of the 9th of August, 1851.

Miss Poole's knowledge of business, and competency to manage her own affairs, subject only to her infirmities, were not questioned.

Bacon and *Amphlett* appeared in support of the petition.

Malins and *Charles Hall* objected, that the petitioner, being deaf, dumb, and blind, was not a person competent to present a petition without the intervention of a next friend.

Osborne appeared for other parties.

THE VICE-CHANCELLOR said, that there was nothing that showed that the petitioner was of unsound mind; and therefore it did not appear to him to be necessary that the petitioner should appear by a next friend. He thought it not likely that he should be disposed to part with so large a fund, and he should require the petition to be amended.

The petition was then amended according to the direction of the court.

By the petition, as amended, it was prayed that the order of the 9th of August, 1851, might be discharged; and that the petition, upon which the same had been made, might be dismissed; and that the sum of 7,235*l.* 2*s.* 10*d.*, bank 3*l.* per cent. annuities, standing in trust "In the Matter of the Trusts of Jane Poole, a person deaf, dumb, and blind," might be carried over by the Accountant-General to the account of the petitioner; and that the said sum of 56*l.* 16*s.* 5*d.* cash, and also the dividends thereafter to accrue due from time to time on the said bank annuities, when so carried over, might be paid to Thomas Dunne, Burcher Hall, in the county of Hereford, Esq., and the petitioner's solicitor, George Pleydell Wilton, or either of them, on behalf of the petitioner, until the further order of the court; and that Mrs. Stevenson might be ordered to pay to Messrs. Dunne and Wilton, or either of them, the said sum of 50*l.* received under the order of the 9th of August, 1851.

The amended petition was mentioned this day by *Bacon* and *Amphlett*; *Malins* and *Charles Hall* appearing for Mrs. and Mr. C. B. Stevenson.

Elderton appeared for Messrs. Dunne and Wilton; and *Osborne* for other parties.

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THE VICE-CHANCELLOR said, he should allow and order the past and future income to be paid to Messrs. Dunne and Wilton, the persons named by the petitioner to receive it, on their undertaking to account.

The order, after directing the taxation of Mrs. Stevenson's costs, charges, and expenses, proceeded:

This court doth order — That it be referred to the Taxing Master of this court, in rotation, to tax the said Caroline Stevenson her costs of paying into court the sum of 7,000*l.*, in the petition mentioned, and of this application, including therein all reasonable charges and expenses properly incurred in relation to the said trust fund; And it is ordered, that such costs, charges, and expenses, when so taxed, be retained by the said Caroline Stevenson out of any moneys that may have come to her hands; [and after setting forth an undertaking by her, by her counsel, to account for and pay to Messrs. Dunne and Wilton the sums already received and thereafter to be received by her on the petitioner's account, after deducting her costs, proceeded thus]: — It is ordered, that the 7,235*l.* 2*s.* 10*d.* bank 3*l.* per cent. annuities, standing in the name of the Accountant-General of this court, "In the Matter of the Trusts of Jane Poole, a person deaf, dumb, and blind," be carried over, in trust, in the same matter, to an account to be entitled, "The Account of the said Jane Poole:" and he is to declare the trust thereof accordingly, subject to the further order of this court. And it is ordered, that the dividends from time to time to accrue due on the said bank annuities, previous to and when so carried over, and also the sum of 56*l.* 16*s.* 5*d.* cash in the bank, on the credit of the said matter, be paid to the said Thomas Dunne and George Pleydell Wilton, or either of them, on behalf of the petitioner, Jane Poole, until the further order of this court; the said Thomas Dunne and George Pleydell Wilton, by their counsel, undertaking to apply all moneys to be received by them, or either of them, under this order, for the benefit of the said Jane Poole, and to account for the same as this court shall direct; and for the purposes aforesaid the said Accountant-General is to draw on the bank, &c."

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March 17 and 18; June 29, 1852.

Specific Performance — Title — Degree of Doubt — Nature of Question — Future — Rights.

On a vendor's bill for specific performance, the opinion of the court was much in favor of the title, the question on which turned on the construction of a particular will; but the court,

¹ 10 Hare, 1.

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being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance.

A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubts, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded.

If the doubts, as to a title, arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubts as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be refused.

The rule rests upon the principle, that every purchaser is entitled to require a marketable title.

If is the duty of the court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation.

A VENDOR'S bill for specific performance. The title was derived under the will of Thomas Pyrke, dated the 27th of February, 1752, which, after directing his debts and funeral expenses to be paid within a year after his decease, providing for the confirmation of leases which he had made of parts of his Notgrove estate, bequeathing some legacies, and giving to Priscilla Bromwich 40*l.* a year for her life, to be paid out of his estate, quarterly, after his wife's death, but not before, he proceeded: "I give to my dear wife Dorothy, who I appoint executrix of this my last will and testament, all my manors, lands, tenements, goods, and chattels, and stock of what nature soever, with all my ready money, and the interest of all securities for money, for the term of her natural life; and when she dies, her funeral expenses to be paid by my heir according to such directions as she shall give before her death, or leave behind her in writing." "I give (after my wife's death) all my manors, lands, tenements, and interest of all my money and securities for money—I mean only the interest of them—and chattels, to my nephew, Joseph Watts, for his life, with liberty to make a jointure of any part of the estate, and also to make leases of any part thereof not exceeding twenty-one years, reserving the best rent he can get for the same premises so leased, and having all usual covenants inserted in such leases on the lessees' part to be done and performed, and such lessee or lessees executing counterparts of such leases; and if the said Joseph Watts shall die, and leave one or more son or sons, I give my said estate to his eldest and every other sons, the eldest to take place before the younger, according to their priority of birth. If the said James Watts should happen to die and leave no son, but only one or more daughters, I give him power to charge the estate with 5,000*l.*, and no more, for their provision; and if the said Joseph Watts shall die and leave no son, then I give my estates to Robert Pyrke, son of the late Rev. William Pyrke, and nephew to Mrs. Collier, upon the same terms and conditions as I gave it to Joseph Watts. And if the said Robert Pyrke shall die and leave no son, but shall leave one or more

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daughters, I give him leave to raise 4,000*l.* out of the estate for their provision. I then give my said estate and estates to the first, second, and other sons of the late Mr. John Skippe, upon the same conditions as before-mentioned to Joseph Watts and Robert Pyrke; and in case all those sons shall die without issue male, then I give my said estates to the eldest and every other son and sons of Mr. George Skippe successively, and their heirs for ever, paying to their brother, Thomas Skippe, 500*l.*, and to their sister, Kitty, the same sum. When I mention sons, I mean those which are lawfully begotten. It is my intent and meaning, and I do hereby order and appoint, that, in case any of the person or persons to whom I have given my said estates under the limitations aforesaid, shall be under the age of twenty-four years when they have a right to the estate, that then the rents and profits of my estates shall be received by Mrs. Whitchurch, the Rev. Mr. Yate, and Mr. John Robinson, who I appoint trustees of this my will, in trust, that they shall apply a reasonable part of such rents for the maintenance and education of such person as shall have a right to the estate, but under the age of twenty-four years, namely, not exceeding 50*l.* a year till they are at the age of twenty-one years, and 100*l.* a year until they are of twenty-four years of age. I give to my trustees 20*l.* each. I also order and appoint, that, after deducting all necessary expenses belonging to their trust, my trustees shall put out to interest money that shall be due for rent or on my securities, till Joseph Watts, or any other person entitled shall attain the age of four-and-twenty years; and if Joseph Watts attains that age, that then he shall have possession of all my estates and securities for money, after he has discharged all legacies and payments ordered by this my will to be paid and discharged upon the conditions aforesaid. I also order, that if the said J. Watts, or any of the Skippes, shall be entitled to the estate of this my will, that they should change their names to that of Pyrke, within two years, otherwise the estate shall go to the person next entitled to it."

The testator then gave directions as to the bringing up of Joseph Watts to the profession of the law, if his wife should live until he should be fit to leave school; and directed, that, after his wife's death, the person entitled to his estate, or his trustees, should lay out 70*l.* for a monument, to be erected in the church of Little Dean, in memory of himself, his wife, and children.

The testator died the 7th of March, 1752, leaving Dorothy his widow, and Joseph Watts, his great nephew and heir at law. The widow died in 1762; Joseph Watts attained twenty-four in 1763, and then entered into possession of the devised estates, and took the name of Pyrke. Joseph Pyrke (distinguished as the elder,) on his marriage in 1766, conveyed the devised estates to uses in favor of himself for life, with remainder to Charlotte, his wife, for life, with divers remainders over. By a feoffment, and a fine levied in 1798, a conveyance of the estate was made to the use of Joseph Pyrke the elder, in fee; and a recovery suffered in the same year, in which Joseph Pyrke the younger, the eldest son and afterwards the heir of Joseph Pyrke the elder, was vouchee, was declared to enure to the use

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of Joseph Pyrke the elder, in fee. Joseph Pyrke the elder, died in 1803, having, by will, devised the estate to Charlotte, his wife, for her life, with remainder to his son Joseph Pyrke the younger, in fee; and leaving also five younger sons. A recovery suffered of the estate, in 1806, was declared to enure, in the first place, to confirm the life-estate of Charlotte, the widow; and, subject thereto, to the use of Joseph Pyrke the younger, in fee. By a deed, dated in February, 1806, the younger sons of Joseph Pyrke the elder, released to Joseph Pyrke the younger, all remainders and other estates, interests, or claims, under the wills of Thomas Pyrke the testator, Dorothy, his widow, or Joseph Pyrke the elder. Charlotte, the widow, died in 1835. Joseph Pyrke the younger, died in 1851, having, by his will and codicil, devised his estates to the plaintiff, his son, in fee.

The plaintiff contracted to sell the Notgrove estate to the defendant, and the present bill was filed for specific performance of the contract. The purchaser by his answer insisted, that, according to the true construction of the will of Thomas Pyrke, the devise was to Joseph Watts, for his life, with remainder to his first and other sons successively, with certain vested remainders over, upon the death of the survivor of such sons, three of whom were still living.

At the hearing,

Sir W. P. Wood, Baily, and Bevir, for the plaintiffs, argued, that any construction which gave to Joseph Pyrke the elder, or to any of his sons, an estate of inheritance, whether in fee or in tail, would give the plaintiff a good title; and that any construction which led to an intestacy, by which the estate would be undisposed of at the decease of the plaintiff, would also give the plaintiff a good title, as taking under the heir at law of the testator. *Robinson v. Robinson*, 2 Ves. 225; s. c. 1 Burr. 38; 3 Bro. P. C. 180; *Mellish v. Mellish*, 2 B. & C. 520; *Chorlton v. Craven*, cited Id. 524; *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87; *Doe d. Jones v. Davies*, 4 B. & Ad. 43; *Clonmerr v. Whitaker*, 2 Jarm., Wills, 373; *Doe d. Nesmyth v. Knowls*, 1 B. & Ad. 324; *Doe d. Burrin v. Charlton*, 1 Man. & Gr. 429; *Raggell v. Beaty*, 2 M. & P. 512; *Shuldham v. Smith*, 6 Dowl. 22.

Roll, C. Barber, and Eddis, for the defendant, submitted, that the will gave an estate for life to Joseph Pyrke the elder, with remainder to his sons in succession, for life, and vested remainders over. The word estate did not describe the interest, but the land. The leaning of the court was always in favor of the vesting rather than of the contingency of remainders. They cited *Doe d. Comberbach v. Perryn*, 3 T. R. 484; *Ives v. Legge*, 3 T. R. 488, n; *Barnacle v. Nightingale*, 14 Sim. 456; *Evans v. Astley*, 3 Burr. 1570; *Earl of Scarborough v. Savile*, 3 A. & E. 897; *Doe d. Lean v. Lean*, 1 Q. B. 229; *Doe d. Jearrad v. Bannister*, 7 M. & W. 292; *Baker v. Tucker*, 2 Eng. Rep. 1. And they contended also, that, whatever the better construction of the will might be, still the case was one of so much doubt, that the court would not enforce specific performance of the

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contract. On this point, several of the cases mentioned in the judgment were referred to, both in the argument for the defendant and in the reply, as was also the Treatise of the Law of Real Property as administered by the House of Lords, p. 257.

June 29. THE VICE-CHANCELLOR. The bill in this case is filed by a vendor against a purchaser, for specific performance; and the question in the cause is, whether the vendor has shown such a title as the court will compel the purchaser to accept.

It is not disputed, that the vendor has shown a good title, if, upon the true construction of the will of Thomas Pyrke, the testator, it is clear either that Joseph Watts, who, after the death of the testator, assumed the name of Pyrke, and became Joseph Pyrke the elder, took an estate tail in possession, or even in remainder expectant upon the estates given to his sons; or that the sons of Joseph Pyrke the elder, who had several sons, some of whom are yet living, took estates either in tail or in fee; or, lastly, that the remainders in favor of Robert Pyrke and the Skippes are contingent, and not vested remainders: but the title of the vendor is questioned upon all these points.

It has now for so long a time been the settled rule of courts of equity not to compel a purchaser to accept a doubtful title, that it is quite unnecessary for me to make any observations upon that subject; but, in considering this case, I have found it necessary to look into the question, what titles are to be considered as doubtful within the meaning of this rule? Whether the rule applies only in those cases in which the court itself entertains doubts upon the title, or whether it extends further to cases in which, although the court itself may entertain an opinion in favor of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. I have, therefore, examined the cases upon this point; and, upon examining them, I do not think that the question is open to much doubt; for in *Marlow v. Smith*, 2 P. Wms. 198, one of the earliest, and in *Price v. Strange*, 6 Madd. 159, 164, one of the latest cases on the subject, there are distinct opinions upon the question. In *Marlow v. Smith*, the then Master of the Rolls not merely expresses his own opinion against the title, but adds, and "there being the opinion of learned men against the title, I will not, nor do I think it reasonable that a court of equity should, compel the purchaser to accept the purchase;" and in *Price v. Strange*, Sir John Leach, though he expressed his opinion in favor of the title, declined to compel the purchaser to accept it.

There is also the case of *Rose v. Calland*, 5 Ves. 186, in which I find the Lord Chancellor saying "I should be in a strange situation in desiring a purchaser to take this title, because I think the point a good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense." 5 Ves. 188. And these dicta and decisions seem to accord with the principle on which the rule appears to be founded; for it may be collected from what fell both from Lord Eldon and Lord Redesdale in *Blosse v.*

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Lora Clanmorris, 3 Bligh, 62, 71, and afterwards from Lord Eldon in *Lord Braybroke v. Inskip*, 8 Ves. 417, that the rule rests upon this, that every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and under all circumstances, be forced upon an unwilling purchaser. I think, therefore, that in these cases it is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be; and that this is the true rule to be applied in such cases, is, I think, the more apparent, from the repeated decisions that the court will not compel a purchaser to take a title which will expose him to litigation or hazard, of which *Cooper v. Denne*, 4 B. C. C. 80; *Crewe v. Dicken*, 4 Ves. 97; *Roake v. Kidd*, 5 Ves. 647; *Sharpe v. Adcock*, 4 Russ. 374, and *Price v. Strange*, 6 Madd. 159, may be mentioned as instances.

Such, then, being the rule by which the court is to be guided in enforcing or refusing to enforce specific performance in cases of this nature, it may well be asked by what scale are the doubts, which may be entered upon the title, to be measured; and the cases, I think, throw some light upon this question also. If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in *Moody v. Walters*, 16 Ves. 283, 312, and *Biscoe v. Perkins*, 1 V. & B. 485, 493; and refusing to enforce it in the other, as in *Blosse v. Lord Clanmorris*, 3 Bligh, 62, and *Sloper v. Fish*, 2 V. & B. 145. If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must of course be refused, as in *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526, 529; *Willcox v. Bellaers*, 1 T. & R. 491, 495, and *Jervoise v. The Duke of Northumberland*, 1 J. & W. 559, 569, the doctrine in which case has been followed by the Vice-Chancellor, Knight Bruce, in *The Earl of Lincoln v. Arcedeckne*, 1 Coll. 98; and even though the court may lean in favor of the title, its duty is either, as expressed by Lord Eldon in *Jervoise v. The Duke of Northumberland*, following in effect what had been said in *Sheffield v. Lord Mulgrave*, to consider whether it would trust its own money upon the title, or, at least, as stated by the same learned judge in *Lord Braybroke v. Inskip*, 8 Ves. 428, with reference to the doubt upon the legitimacy, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances, which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused, according to *Loves v. Lush*, 14 Ves. 547; *Hartley v. Smith*, Buck's B. Cas. 368, and *Smith v. Death*, 5 Madd. 371, 372.

It may be thought, perhaps, that, if the court is of opinion in favor of the title, a specific performance ought necessarily to be decreed; and the cases of *Rushton v. Craven*, 12 Price, 599, and of *Chorlton v. Craven*, cited Id. 619, mentioned in it, were cited in support of that position, as was also *Clonmert v. Whitaker*, 2 Jarm. Wills, 373;

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but in those cases the opinion of the court has been fortified by the opinion of a court of law; and looking at the other cases to which I have referred, I cannot venture to hold, that, because this court is of opinion in favor of the title, a purchaser is to be compelled to accept it. I think that each case must depend upon the nature of the objection, and the weight which the court may be disposed to attach to it; and that, in determining whether specific performance is to be enforced or not, it must not be lost sight of, that the exercise by the court of its jurisdiction in cases of specific performance, is discretionary; and that, as was observed in *Cooper v. Denne*, and *Sheffield v. Lord Mulgrave*, the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded.

It remains for me only to apply these principles to the present case.

The question upon this title depends, I think, principally, if not wholly, upon the construction of this particular will, and not upon any general rule of law. I have fully considered the questions, and the authorities which were referred to in the argument. My opinion, I do not hesitate to say, is much in favor of the title, more especially upon the point as to the remainders being contingent; but I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind, that other competent persons may not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard. Upon these grounds, therefore, I am of opinion, that a specific performance ought not in this case to be decreed; and I am the more strongly of that opinion, because I think, that, in cases of this nature, where titles may be affected by rights which may hereafter arise, it is the duty of the court to consider how it would act if those rights had actually arisen, and were in the course of active litigation; and I am satisfied, that, if the questions which may arise upon this title were now in active litigation between the plaintiff and adverse claimants, I should not feel myself justified in disregarding that litigation, and decreeing a specific performance during its pendency.

It was pressed in argument, that, if I should arrive at this conclusion, a case might be directed; but, the defendant objecting to that course, the plaintiff has no right to insist upon a case. The court refused to send a case both in *Rooke v. Kidd*, in *Willcox v. Bellaers*, and in *Sharp v. Adcock*; and in *Sheffield v. Lord Mulgrave*, where a case had been directed, the court refused to act upon the certificate against the purchaser. I take the rule of the court upon this subject to be, that it will not, against a purchaser, send a case upon a doubtful question of law, any more than it will direct an inquiry upon a doubtful question of fact, and for the same reason, that adverse claimants would not be bound by the result.

The conclusion, therefore, at which I have arrived is, that this bill must be dismissed. I repeat, that I dismiss it, not from any opinion

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against the title, — my opinion being in favor of it, — but upon the grounds which I have stated. The bill being dismissed, I must give the defendant the costs. The case of *Blosse v. Clanmorris* is, I think, decisive upon that point.

In the Matter of DODSWORTH'S TRUST.¹

June 25, 1852.

Lunatic — Investment — Life Annuity.

Investment of a fund belonging to a lunatic in an annuity for his life.

THE surviving executor of a testator paid into court a legacy of 4,000*l.*, bequeathed to Ann Middleton, for her life, and after her decease to her children equally. Ann Middleton was dead, and the children presented their petition for payment of their respective shares of the fund. Charles Middleton, one of the children, was stated by the affidavits to have been an idiot from his birth. His share of the fund was 519*l.* 9*s.* 4*d.* reduced annuities, which were carried to his separate account. A petition was now presented, praying that the 519*l.* 9*s.* 4*d.* stock, might be sold and invested in the purchase of a government annuity for the life of Charles Middleton, who was of the age of forty-nine, whereby it was stated that his income would be increased from 14*l.* to 30*l.*, or thereabouts.

Fooks, for the petition, referred to three cases mentioned by Mr. Shelford in his *Treatise of the Law of Lunatics*, &c., p. 272, 2d edition, *In re Baldwin*, 6th August, 1814; *In re Barrass*, 16th November, 1825; *In re Chabot*, 20th June, 1827, and also to the case of *Ex parte Stonard*, 18 Ves. 285.

THE VICE-CHANCELLOR said, he should have no difficulty in following these authorities:—

Let it be referred to the taxing master to tax the petitioners their costs, charges, and expenses of and relating to this application, and consequent thereon; and let so much of 519*l.* 9*s.* 4*d.* reduced annuities, standing in the name of the Accountant-General of this court, in trust in the matter of the trusts of the will of Joseph Dodsworth, deceased, the account of Charles Middleton, as will be sufficient to raise the amount of such costs, and costs, charges, and expenses, be sold with the privy, &c.; and out of the money to arise by the said sale, when so paid into, &c., let the said costs be paid. Let the peti-

¹ 10 Hare, 16.

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tioner, Henry Middleton, be at liberty to enter into a contract with the commissioners for the reduction of the national debt, for the purchase, in the name and on the life of the petitioner, Charles Middleton, a person of unsound mind, of such a government annuity as can be purchased by the transfer to the said commissioners of the residue of the said 519*l.* 9*s.* 4*d.* reduced annuities, standing in the name of the said Accountant-General, in trust, &c. And let such residue of the said 519*l.* 9*s.* 4*d.* reduced annuities, the amount to be certified, &c., be transferred to the said commissioners for the reduction of the national debt, as the consideration for the purchase of such annuity; And let the said commissioners pay the said annuity to the said Henry Middleton, until the further order of this court, he undertaking duly to apply the same towards the maintenance of the said petitioner, Charles Middleton.

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March 10, and August 6, 1852.

Covenant for Production of Deeds — "Proper and Sufficient" Covenant — Vendor and Purchaser.

An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator: —

Held, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word "sufficient" was connected with the word "proper"; that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that the releases to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the court, are required to covenant for their own acts only; and that the court would not compel the purchasers, who were only releasees to uses, — especially after the uses were executed by the statute, — to enter into such covenants.

A SPECIAL CASE. The question was, whether a covenant for the protection of title deeds, stipulated for and agreed to be given by articles of agreement for the sale of an estate called "the Routh estate," ought to be entered into by the defendant, Lord Londesborough, or by the other defendants, Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow.

By indentures of lease and release and settlement, the release and

¹ 10 Hare, 67.

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settlement being dated the 19th of September, 1816, two estates, called "the Risby estate" and "the Routh estate," were conveyed to Arthur George Earl of Onslow, one of the plaintiffs, and John Hall, their heirs and assigns, to the use of trustees, for a term of 1000 years, upon trust for raising certain moneys for the purposes in the settlement mentioned, and subject thereto to the use of Edward Mainwaring Onslow, for his life, with remainders over. And in the same settlement was contained a covenant for the surrender of certain copyhold estates to the use of Arthur George, Earl of Onslow, and John Hall, their heirs and assigns, upon the trusts declared thereof by the same settlement. By a deed of the 19th of June, 1835, the plaintiff, James Middleton Hall, was appointed a trustee of the settlement in the place of John Hall, deceased. The plaintiffs, Lord Onslow and John Middleton Hall, were admitted to the copyhold estates comprised in the settlement of 1816, upon the trusts declared by that settlement.

The Routh and the Risby estates comprised in the settlement of 1816 having been subject to incumbrances, which were raisable by means of the term of 1000 years, and which could not be raised otherwise than by means of that term, a private act of parliament was obtained in the 9th of the Queen, by which the Routh estate, and the inheritance thereof in fee simple, were vested in the plaintiffs, Thomas Crawley Onslow and George Augustus Crawley Onslow, their heirs and assigns, freed and absolutely discharged from the uses, trusts, limitations, provisions, and declarations of the settlement of 1816, upon trust, with the consent of Edward Mainwaring Ellisker Onslow, during his life, and, after his decease, with such consent as in the said act mentioned (but subject and without prejudice to the several mortgages and other charges thereon and raisable thereout, under the trusts of the term of 1000 years,) to sell the Routh estate, or such part or parts thereof as the said trustees or trustee should, in their or his discretion, with such consent as aforesaid, from time to time think proper, and to make, do, and execute all such acts, deeds, conveyances, surrenders, and assurances, matters, and things whatsoever, as should be requisite or proper for the purpose of effectuating and completing such sale or sales.

In pursuance of the trust created by this act of parliament, the plaintiffs, Thomas Crawley Onslow and George Augustus Crawley Onslow, on the 6th of August, 1850, agreed to sell the estates comprised in the act to the defendants, Sir William Mededith Somerville, Henry Frederick Stephenson, and John Benbow; and it was upon this agreement, taken in connection with the conveyances made under it, that the question in the present case arose.

The agreement recited, that the vendors, as trustees named in the act of parliament, had contracted with the purchasers for the absolute sale to them of the Routh estate, with the appurtenances and the advowson of the rectory of Routh, and the several messuages and hereditaments thereafter mentioned, in fee simple, free from incumbrances (except as thereafter mentioned) at the price of 69,000*l.*, inclusive of the timber thereon, and the landlord's improvements;

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and it was thereby agreed between the vendors and purchasers, that the title deeds and documents relating to the said manor, advowson, messuages, and hereditaments, which were in the possession or power of the vendors, should, upon the completion of the said sale, be delivered to the purchasers; but as the same also related to other estates belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors or such other persons as they might direct, for the production and delivery of copies of the said deeds and documents; and that the costs of any such deed or deeds of covenant as aforesaid should be paid by the vendors.

The defendants, Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, were trustees under the will of Mr. Denison, who died on the 2d of August, 1849, having by his will, dated in August, 1848, devised all his estates in the counties of York and Surrey to the use of his nephew, Lord Londesborough, and his assigns, for his life, without impeachment of waste, with divers remainders over in strict settlement; and in the said will was a proviso, that if any person, whom the said testator had made tenant in tail of the estates thereafter directed to be purchased with his (the testator's) residuary personal estate, was or were then born, or should thereafter be born in his lifetime, or in due time after his decease, the estate or several estates in tail male thereby devised to each such person should cease, and in lieu thereof the said testator devised the manors and hereditaments therein mentioned, for such estate in tail male, to the person respectively whose estate in tail male should so determine, for his life, without impeachment of waste, with remainder to the use of his first and every other son successively, according to their respective seniorities in tail male; and for the purpose of preserving the contingent remainders thereinbefore created, the testator devised all the hereditaments thereinbefore devised to the use of any person during his life, from and after the determination of that estate by any means in his lifetime, to the use of the defendants, Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, and their heirs, during the life of the tenant for life whose estate should so determine, in trust for him, and by the usual ways and means to preserve the contingent remainders expectant or dependent thereon. And the testator gave the residue of his personal estate unto Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, their executors, &c., upon trust, after payment of his debt and legacies, within the space of ten years after his decease, or sooner, if his trustees could find a proper purchase or purchases, to lay out the residue of such moneys in the purchase of estates in fee simple, in England, Wales, Scotland, or Ireland, of a clear and undefeasible estate of inheritance, or of any copyhold or leasehold lands or tenements convenient to be held therewith, but not exceeding the proportion therein mentioned, and to settle and assure the estates so to be purchased as last directed, to the uses and for the trusts and subject to the powers and declarations in the said will expressed concerning his estates in York and Surrey.

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The testator died in August, 1849. Lord Londesborough was now in the actual possession or receipt of the rents of the devised estates.

The purchase agreement of the 6th of August, 1850, was, so far as respects the conveyance of the Routh estate, completed by deeds of January, 1851; by which that estate was conveyed to Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, to the uses declared by the will of Mr. Denison; and the title deeds were, in pursuance of the agreement, delivered to Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, as purchasers. The plaintiffs required Sir William Meredith Somerville, Henry Frederick Stephenson, and John Benbow, the releasees to uses in the conveyance of January, 1851, to execute a proper deed of covenant for the production of the title deeds; but they declined to enter into such covenant themselves, and, with the assent of Lord Londesborough, the legal tenant for life under the uses of the same conveyance, offered that such covenant should be entered into and executed by him.

Daniel, for the plaintiffs, the vendors. The covenant by Lord Londesborough, the tenant for life, would not run with the land, and would not be sufficient; and the vendors were entitled to a covenant by the purchasers, the trustees of Mr. Denison's will, to whom the conveyance had been made.

Rolt, for the purchasers. The argument for the plaintiffs, in order to establish their title to the covenant by the releasees to uses, ought at least to establish, not only that the covenant by the tenant for life will not bind the estate, but also that the covenant of the releasees to uses will have that effect. They have no estate. A covenant by them would not run with the land, and would not therefore give the plaintiffs the benefit of the security which they claim. The argument, however, proceeds on the assumption that the vendors are entitled to a covenant that will for all future time bind the parties in whom the estate may be vested. The agreement does not go to that extent. It must be construed with reference to the situation of the parties who are purchasers, and to the form of the conveyance which they may take; and, in the circumstances of this case, the vendors are entitled to the covenant of the tenant for life only. *Jenkin v. Peace*, 6 M. & W. 722; *Barclay v. Raine*, 1 S. & S. 449; *Riddell v. Riddell*, 7 Sim. 529; *Roach v. Wadham*, 6 East, 289; *Ford v. Peering*, 1 Ves. jun. 76; *Keppell v. Bailey*, 2 My. & K. 517; *Spencer's case*, 5 Co. 16; 1 Smith's Lead. Cas. p. 27, n.; Sugden's Vend. & Pur. 336, Conc. Edit.

VICE-CHANCELLOR. The first question to be considered in this case appears to me to be, what is the meaning of the words "one or more proper and sufficient covenant or covenants," contained in this agreement, and particularly, what is the meaning to be attached to the word "sufficient?" Was it meant to import that the vendors were

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to have a covenant or covenants, which, at all times and in all circumstances, should secure to them the production of the deeds, or merely that the vendors should have such a covenant or covenants, as according to the ordinary practice and the views of this court, would be deemed to be sufficient? This, I think, must be determined by the context of the agreement;— and seeing that the word “sufficient” is connected with the word “proper;” that, according to the provisions of the agreement, it was to rest with the purchasers to whom and in what manner the conveyance was to be taken; and that the extent and sufficiency of the covenant must, in a great degree, depend upon the mode in which the conveyance might be taken;— I think that the word “sufficient,” as used in the agreement with reference to this covenant, must be taken in the more limited, and not in the extended sense, to which I have referred. It must be taken to mean “sufficient” with reference to the agreement and the conveyance to be made under it. The unqualified stipulation that the deeds should be delivered to the purchasers, and the embarrassment which might arise to them if the word “sufficient” was to be construed in the unlimited sense contended for, seems to me to confirm this view of the case.

Assuming, then, the construction which I have put upon the agreement to be correct, the next question to be considered is, what, according to the ordinary practice and the views of this court, would have been the covenant or covenants for production to be entered into or procured to be entered into by the purchasers upon a conveyance which they had a right to require and had required to be made to the uses of Mr. Denison's will. Would this court, if it had been called upon to execute the agreement, have required the releasees to uses to enter into the covenant or covenants for production? It is contended on the part of the plaintiffs, the vendors, that the covenant would have been to be entered into by the releasees to uses, because it is said it would then have run with the land. Whether the burden of a covenant or covenants so entered into would have run with the land or not, is, in my opinion, a very nice and difficult question, on which, had it been necessary to decide it, I should have thought it right to require the assistance of a common-law judge. But I do not think it is necessary to decide that point. The true question in this view of the case would, in my opinion, have been, not whether the covenant or covenants entered into by the releasees to uses would have run with the land, but whether the vendors conveying, as they were bound to do, to the uses of Mr. Denison's will, could have required the releasees to uses to enter into such a covenant or covenants. I am of opinion that this court would not have compelled the releasees to uses to enter into such a covenant or covenants.

The ordinary practice and the ordinary rule of the court is, that trustees covenant against their own acts only; and I do not think that releasees to uses can be considered to stand in a worse position than trustees.

It may be said, that the trustees of Mr. Denison's will, being themselves the releasees to uses, the right to the covenant from them would

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depend upon their agreement, and not upon any ordinary practice or rule; but, in addition to what I have already observed upon this subject, it is to be remembered that the agreement is to enter into the covenant, or procure it to be entered into; and, suppose other persons had been named in the conveyance as the releasees to uses, could Mr. Denison's trustees have been compelled to procure, and could they have procured, those other persons to enter into the covenant?

There are two most important considerations connected with this view of the case—the liabilities which would be consequent upon the covenant, and the rights of the *cestui que use* under Mr. Denison's will. As to the liabilities consequent upon the covenant,—suppose the deeds to be lost or destroyed, would not the releasees to uses be liable in damages, and how are those damages to be recouped to them? The statute has executed the use, and they have no estate to answer the damages; and, as to the rights of the *cestui que use* under Mr. Denison's will, I think, that, notwithstanding some early cases upon the subject, the *cestui que use* would probably now be held entitled at law to the deeds; and, at all events, this would be a question. And would this court place the releasees to uses in this position, that they should be liable to be sued at law by the *cestui que use* for detaining the deeds, and should be driven to assert in this court an equity to retain them upon the ground of the covenant into which they had entered? It is not, I think, even clear that such an equity would hold, at least in favor of the trustees themselves, taking them to be the releasees; for the equity would arise out of the contract, and it might perhaps be said, that it was a breach of duty in them to have so contracted as to have deprived the *cestuis que use* of their legal right. I think, therefore, that this court would not have compelled the releasees to uses to enter into this covenant for production. Whether it would have enforced the contract at all, if the vendors could not obtain a covenant for production running with the land, may be another question; but it is unnecessary to consider this, as the contract has been completed as to the estate by conveyances; and this brings me to a point which appears to me to be decisive upon the question submitted by this case. These estates have been conveyed to legal uses. The statute has executed those uses. The legal estate has passed to Lord Londesborough, and the subsequent uses, so far as they are *in esse*, are served. How can any covenant, entered into by the releasees, who have not the legal estate, run with the land? Suppose the conveyance had been taken to the trustees themselves, and they had conveyed to the uses of Mr. Denison's will,—no covenant for production entered into by them after they had conveyed, could, as I conceive, have run with the land; and I do not see how the case is differed by the circumstance of the estate passing by the operation of the statute and not by the conveyance of the trustees. Under the circumstances of this case, therefore, I am of opinion that the plaintiffs, the vendors, must be satisfied with the covenant of Lord Londesborough; and I must declare accordingly.

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HARMAN v. RICHARDS.¹

July 27 and 28; November 3 and 4; December 2, 1852.

Consideration — Settlement — Several Deeds constituting one transaction — Agreement not to take Proceedings against a Debtor in his Estate — Construction.

The question, whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into, or connected with, each other.

Evidence of surrounding circumstances, on which the court

Held, a settlement, that standing alone would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase-deeds of even date, to which some only of the same persons were parties.

The release and assignment by a married woman of her life-interest in her separate estate, although fettered by a restriction against anticipation, was

Held, to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income; and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made.

An agreement by a creditor not to take proceedings against the debtor, during his life, nor against the debtor's estate, during the life of his wife, if she should survive him, construed (as to the latter clause) to mean, that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and, therefore, the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life.

Parties to a series of deeds, considered as stipulating according to the rights which they had.

Consideration for a settlement being found to exist, it was

Held, to extend to the whole and not to a part only of the property which was the subject of it.

A deed, though made for valuable consideration, may be affected by *mala fides*.

THE plaintiffs filed their bill as creditors upon the estate of John Richards the elder, for the administration of his estate, and to set aside a settlement made by him, dated the 20th of January, 1846. The debt upon which the plaintiffs sued was thus constituted: In September, 1844, John Richards the younger, the son of John Richards the elder, contracted to purchase White Knight's estate from Sir J. L. Goldsmid and John Alliston, for 29,700*l*. In December, 1844, the estate was duly conveyed to him; and on the 13th of that month he mortgaged it to Sir J. L. Goldsmid for 20,000*l*. On the same day he mortgaged the equity of redemption of the estate to the plaintiffs for 10,000*l*, advanced by them to him, and payable in three months; and in this mortgage his father, John Richards the elder, joined, and

¹ 10 Hare, 81.

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the father and son entered into a joint and several covenant for payment of the 10,000*l.* and interest. The father also conveyed some ground rents at Notting-hill, and charged a mortgage for 1,500*l.*, as collateral securities for the 10,000*l.* and interest. By the sale of the ground rents and payment of the mortgage of 1,500*l.*, the debt to the plaintiffs was reduced by 4,500*l.* In the end of 1846, John Richards, the son, became bankrupt, and the White Knight's estate was sold under his bankruptcy to Sir J. L. Goldsmid for less than the amount due upon his mortgage; so that the balance of 10,000*l.*, and interest remained due to the plaintiffs, upon the covenant only. John Richards the elder, died in May, 1851, and Harriet Richards, his widow, was his personal representative.

The facts as to the settlement of the 20th of January, 1846, were these:—Harriet Richards, the widow, was entitled for life under the will of her father, to the income of one third of his residuary estate for her separate use, without power of anticipation; and, subject to her life-interest, the same third was limited in remainder to her children. John Richards the younger, was her only child; G. S. Higgs was the surviving trustee of the will. On the 7th of April, 1842, Higgs sold out 3,310*l.* 9*s.* 7*d.* consols, part of the funds subject to the trusts of the father's will, and lent the proceeds, amounting to 3,000*l.*, with 500*l.* of his own moneys, to John Richards the younger, on the security of the joint and several promissory note of the father, mother, and son. On the 9th of September, 1843, Higgs sold out 3,155*l.* 0*s.* 1*d.* consols, further part of the trust funds, and lent the proceeds, amounting to 3,000*l.*, to John Richards the younger, on the security of a like promissory note. These sums were also secured to Higgs by the deposit with him of the title deeds of a house at Reading, and a leasehold house in Regent street, belonging to John Richards, the father. A question arose upon the evidence, at what time this deposit was made. Higgs had also, in September, 1839, lent a further sum of 300*l.* to John Richards the younger, and one Shute, on their joint and several bond; and in the month of October, 1839, he lent another sum of 300*l.* to John Richards the younger, on the security of his promissory note. On the 24th of January, 1846, two deeds were executed, both of which were dated the 20th of January, 1846. By one of these deeds, the defendant, Harriet Richards, the mother, released and assigned to Higgs her life-estate under her father's will, and Higgs covenanted, in consideration of such assignment and release, to pay her an annuity of 250*l.* for her life; and, by the other of such deeds, John Richards the younger, assigned to Higgs his reversionary interest under the same will, in consideration of the release, by Higgs, of the moneys, amounting, as it was stated, to 7,165*l.*, owing to him by John Richards the younger, together with the covenant of Higgs, to pay off an incumbrance with which such reversionary interest was charged in favor of third persons, and also in consideration of the delivery up of the title deeds of the Reading and Regent street property.

The settlement impeached by the bill also bore date the 20th of January, 1846; and John Richards the elder, thereby, in consideration

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of natural love and affection, conveyed and assigned his freehold and leasehold property at Reading and in Regent street, and some property owing to him on mortgage, to Hooper and Rogers, upon trust for Harriet Richards, for her life, with remainder to John Richards the elder, for his life, with remainder to Fanny Richards, the wife of John Richards the younger, for her life, for her separate use; and from and after the decease of the several parties so entitled for their respective lives, upon trust, to divide the property equally amongst the children of Fanny Richards by her said husband. This settlement was not executed until the 27th of January, 1846, but the draft of it was settled on the 23d of January.

The defendants to the suit were, Harriet Richards, the widow, Hooper and Rogers, the trustees of the settlement, John Richards the younger, and Fanny his wife, and their children. Evidence was entered into on both sides at great length. On the part of the defendants it was, amongst other things, directed to prove, that three deeds, dated the 20th of January, 1846, were made to carry out the agreements of the several parties thereto at the time of the transaction, and which agreements were, in many respects, connected with and dependent upon each other, although not so expressed by the deeds themselves.

Another point arose on the effect of a correspondence between the solicitors of the plaintiffs and of Mr. and Mrs. Richards, on the occasion of the sale and conveyance of the Notting-hill ground rents, as amounting to an agreement affecting the liability of the estate of John Richards the elder, and the right of the plaintiffs to institute a suit against Harriet Richards, his widow and personal representative, in respect of that estate. These letters are stated in the judgment. *Infra*, p. 90.

Rolt, Baily, and Grove, for the plaintiffs.

Bothell, Follett, W. M. James, and Kinglake, for the several defendants.

VICE-CHANCELLOR. The principal question to be determined is, whether the settlement of the 20th of January, 1846, was founded on good consideration; and, in order to determine this question, it is necessary, in the first place, to consider whether the settlement is to be taken by itself, or in connection with the purchases from John Richards, the son, and the defendant, Harriet Richards, which were carried into effect by the deeds of even date — whether the settlement and purchases are to be considered as parts of the same transaction, or as separate and distinct transactions; for if the settlement is to be taken by itself, and as a transaction wholly separate and distinct from the purchase, it does not appear to me that there is any consideration by which it can be supported.

The question, whether several deeds are to be taken as parts of the same transaction, must, as I apprehend, depend upon all the surrounding circumstances of each particular case, and not upon the

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simple fact, whether the deeds are or are not by express reference grafted into or connected with each other; and we must, therefore, in this case, look to what are the surrounding circumstances, so far as they affect the connection of the deeds. They appear to be these: trust stock, to which the defendant, Harriet Richards, was entitled for life, for her separate use, without power of anticipation, with remainder in effect to John Richards, her son, was sold out by Higgs, the trustee, and the proceeds were lent by him, with some moneys of his own, to John Richards, the son, on the security of the joint and several promissory notes of John Richards, the father, and John Richards, the son, and the defendant, Harriet Richards, the wife. These loans, to the extent of 6,500*l.*, were further secured to Higgs by the deposit of the title deeds of a house at Reading, and a house in Regent street, belonging to Richards, the father. Higgs, the trustee, purchased the interests of Richards, the son, and the defendant, Harriet Richards, in the trust stock, and those interests were, or were purported to be, assigned to him by two deeds, which were dated the 20th of January, 1846, and were executed on the 24th of that month. Upon the execution of these deeds the promissory notes were given up, and the deeds which had been deposited were returned to the father. Pending the transaction of these purchases, and on the 12th of January, 1846, the house at Reading, the legal interest in which was vested in Richards, the son, in trust for the father, was conveyed by the son to the father. The draft of the settlement in question was prepared and settled before these purchase deeds were executed; the settlement was not executed until the 27th of January; but it appears, that, in the course of the treaty for the purchase of the life-interest of Harriet Richards, a discussion arose as to the amount of the annuity which Higgs was to give for the purchase, and that the amount which he had, in the first instance, proposed to give, being reduced, it was agreed that the property to be put into the settlement should be increased. Under these circumstances, I feel bound to conclude, that the settlement and purchases were connected together, and were, in fact, parts of the same transaction. There are several circumstances which lead to this conclusion. The delivery up of the deposited deeds, and the conveyance from the son to the father, tending to show that the property was about to be dealt with, and the corresponding variations in the money to be paid for the life-interest, and in the property to be settled, directly evidence the connection of the transactions; and, independently of these circumstances, the evidence in the cause is direct, that the settlement and purchases were parts of the same transaction; which, however, can only be understood to mean that they were so as between the father and son, and the defendant, Harriet Richards, for it does not appear that Higgs, the trustee, was in any way party to the settlement.

It was indeed contended, on the part of the plaintiffs, with reference to this and other parts of the case, that there was no sufficient evidence on the part of the defendants of the *bona fide* deposit of the deeds with Higgs, for securing the loans to Richards, the son, of 3,500*l.* and 3,000*l.*; and that the deeds had been passed over to

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Higgs for the purpose of giving a color to the settlement: but I do not find that any such case is made by this bill; and I am of opinion that there is sufficient evidence to prove a *bond fide* deposit of the deeds with Higgs.

The question as to the settlement being upon good consideration, does not, however, entirely rest here. It is argued for the plaintiffs, that, even assuming the settlement and purchases to have been connected together, there is no sufficient consideration for the settlement; that, the wife's life-estate being fettered by the restriction against alienation, she could not part with or affect her interest; that it appears by the deed of purchase from her, that all arrears of her income had been paid; and that the assignment by her could furnish no consideration for the settlement: but I cannot agree in this argument. It is true, that the assignment by the defendant, Harriet Richards, could not pass or affect her future interest; but she was competent to release, and did, by the deed of purchase from her, release, her trustee, Higgs, from all claims in respect of her past income. Again, the question of consideration, as I apprehend, depends not upon the point whether her assignment passed her interest, but upon this, whether her concurrence enabled the settlement to be made; and it cannot, I think, be doubted, that, but for her concurrence, the assumed purchase of her life-interest by Higgs never would have been completed. It cannot, I think, be supposed that Higgs would have ventured to purchase her life-interest merely upon the covenant of Richards, the father, and Richards, the son, that she would be bound by the transaction, without her concurrence in the deed of assignment to him; or even that he would have purchased the son's reversion without purchasing her life-interest also; and if these purchases had not been made, the title deeds deposited with Higgs, could not have been got out of his hands, and the settlement therefore could not have been made. In addition to these considerations, Richards, the father, concurred in the breach of trust committed by Higgs, in selling out the trust stock, and was debtor to Higgs on that account; and his deeds, whilst in the hands of Higgs, were subject to a lien, to the benefit of which the defendant, Harriet Richards, was, as I apprehend, entitled; but, when the deeds passed from Higgs, the lien was gone; and it was in consequence of the purchase from the defendant Harriet Richards, that the deeds were taken out of Higgs' hands, and the lien destroyed.

If, then, the deeds are to be, as I have already determined that they must be, taken together, is it not the fair result of the whole transaction, that the wife must be considered to have agreed with the husband, that, if he would make the settlement, she would not interpose to prevent the title deeds being delivered up? It may be said, that there is no evidence of any such agreement; but, when the transactions are put together, the parties must, I think, be considered to have stipulated according to the rights which they had. Looking at the case in these several points of view, my opinion upon the whole is, that this settlement must be taken to have been for good consideration.

It was argued for the plaintiffs, that, although there might be consideration for the settlement of the Reading and Regent street pro-

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perty, there could be no consideration for the settlement of the mortgages comprised in the deed; but the settlement was one transaction: and if I am right in concluding that there was consideration for it all, I think the consideration must ride over the whole, and cannot be split, so as to exclude the mortgages from its operation.

It remains, then, to be considered, whether the settlement, which was thus made for valuable consideration, was also made *bonà fide*; for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge.

[His Honor then examined the evidence on which the argument on behalf of the plaintiffs on this point was founded, and concluded that there was not sufficient to impeach the settlement on that ground.]

Upon the whole, therefore, my opinion is, that this settlement is good; and that the bill, so far as it seeks to impeach it, must be dismissed; but it must be dismissed without costs.

There are other grounds on which, perhaps, this settlement might be supported; but I have not thought it necessary to enter into them.

The only remaining question in the cause is, as to the right of the plaintiff to the general decree for an account. It appears, that, when the Notting-hill ground rents were sold, the purchasers refused to complete, without the concurrence of the defendant, Harriet Richards, being advised that her dower had not been barred; that the plaintiff's solicitors then applied to Richards, the father, to procure his concurrence; and that, in consequence of this application, they received from the defendant Rogers, who was then acting for Richards the father, and the defendant, Harriet Richards, the following letter:

"Reading, April 1st, 1846.

"I have seen Mr. and Mrs. Richards on the subject of your letter, and they both feel most desirous not in any way to impede Mr. Harman's realizing the produce of the ground rents, and Mrs. Richards will therefore concur in the conveyances, so as to release her dower. She however feels, in which Mr. Richards and myself concur, that, concurrently with her doing this, Mr. Harman ought to acquiesce in the request I made some time since, and release Mr. Richards from the covenant contained in the mortgage deed. Mr. Harman surely will feel, that when he has received from Mr. Richards his last property, making on his part a sacrifice of 5,000*l.*, in a matter wherein he had no interest, that it is not much to ask, that what to Mr. Harman is worthless, but to Mr. and Mrs. Richards a rod of perpetual terror, may no longer be hung over their heads. I hope Mr. Harman will consider this subject, and that I shall hear from you in a day or two that my request will be acceded to."

This letter was answered by the plaintiff's solicitors on the 3d of April, as follows:—

"We have seen Messrs. Harman on the subject of yours of the 1st,
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with reference to releasing Mr. Richards, senior, from his covenant for payment of the 10,000*l.*, and, under all the circumstances, we are authorized to assure you, that although they decline releasing him from the covenant, no proceedings shall be taken against him during his life, under such covenant, nor against his estate during the life of Mrs. Richards, his present wife, should she survive him. This assurance will, we trust, be satisfactory to them both; and it is given in full confidence, that nothing will be done by Mr. Richards to deprive Messrs. Harman of any remedy against his property after the deceases of Mrs. Richards and himself. Messrs. Harman wish also to state, that they depend upon you, with whom the management of both the Mr. Richards's affairs appears to rest, that such arrangements may be made with reference to Mr. Richards' jun. assets, that Messrs. Harman may have a fair proportion of them in common with his other creditors, for such amount, if any, as their mortgage securities shall prove insufficient to meet, and they would like some little information, on this subject."

The defendant, Harriet Richards, soon afterwards concurred in the conveyances of the ground rents to the purchasers; and the question on this part of the case is, whether, under these circumstances, the plaintiffs are debarred of their right to sue during the life of the defendant, Harriet Richards. I am of opinion that they are not. I think that the true meaning of the letter of the 3d of April was merely this, that any beneficial interest which the defendant, Harriet Richards, might take in the property of her husband, should not be disturbed during her life. She was not then the representative of her husband, or entitled to any of his property, and she never might become so; and it could never be intended that the plaintiffs should be precluded from suing a stranger, when she might not be interested in the result of the suit. But valuable consideration was given for the agreement contained in the letter; and I think, therefore, that the plaintiffs cannot recede from it.

It was argued on their part, that the agreement was conditional, and that it was determined by the conduct of Richards, the father; but I think it is no further conditional than that the plaintiffs relied upon the honesty of Richards, the father; and that, assuming it to be conditional, the condition did not reach to such a transaction as the settlement in question. There is nothing, I think, which would warrant me in disregarding the agreement. It is not even prayed by the bill that it may be set aside. My opinion, therefore, is, that there must be a decree for the accounts, with a declaration that the interest of Mrs. Richards is not to be disturbed during her life.

SOUTH EASTERN RAILWAY COMPANY v. KNOTT.¹

June 9, and July 28, 1852.

Specific Performance — Vendor and Purchaser — Abandonment of Contract.

A railway company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the company required for the railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—

Held, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs.

The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the court, while the conduct of the other may debar him from that right.

A BILL against William Knott and George Duerr, for the conveyance of a piece of ground, containing about eighteen perches, agreed to be purchased by the company from the defendant William Knott, and on which, or part of which, the railway had since been constructed.

The plot of land was situated on the south side of Spring street, Deptford. The agreement for purchase bore date the 1st of September, 1848, and was made between Knott of the one part, and an agent of the company of the other part. Knott thereby agreed to sell, and the company to purchase, the property described in the schedule, for the sum of 300*l*. The company to be at liberty to take immediate possession, on depositing the purchase-money in the London and Westminster Bank, and to pay interest at 5*l*. per cent. from the time of taking possession. The purchase to be completed within three months; and thereupon the money to be paid to the vendor or otherwise, according to the company's acts; and if a valid conveyance should not be made to the company within that period, the company to be at liberty to pay the purchase-money into the bank according to the acts, and the interest to cease upon such payment. The schedule described the property as a piece of vacant ground near Spring street, Deptford, containing eighteen perches. The defendant Duerr was not a party to this agreement; but it appeared that, before the agreement was entered into, the company had served both him and Knott with the usual notice that the lands were required, and the usual requisition to send in their claims; and that, in consequence of the notice and requisition, Duerr had sent in a claim, demanding 500*l*. for the land; and it also appeared, that, the conveyance not having

¹ 10 Hare, 122.

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been completed according to the agreement, the company paid the 300*l.* into the bank to the following account:—

“Ex parte The South Eastern Railway Company. The account of William Knott, claiming to be owner in fee simple of eighteen perches of land or ground situate near Spring street, in the parish of Deptford, in the county of Kent, but failing to make title thereto, except under a contract, bearing date the 30th of June, 1836, entered into by the said William Knott with Frederick Duerr, for the purchase thereof at the price of 73*l.* 10*s.* And to the credit of George Duerr, who is the heir at law of the said Frederick Duerr, and also the administrator of the said Frederick Duerr; and of Beriah Drew and George Drew, solicitors of the said Frederick Duerr, who claim to have a lien or charge as solicitors on the said piece of ground or the title deeds relating thereto.”

Some proceedings were taken under the acts with reference to the money thus paid in; and in consequence of those proceedings, and of Duerr having brought an ejectment to recover the land, this bill was filed. The effect of the evidence is stated in the judgment.

Baily and Simpson, for the plaintiffs.

Selwyn, for the defendant Knott.

Rolt and Speed, for the defendant Duerr, upon the lapse of time, cited *Alley v. Deschamp*, 13 Ves. 225, and *Guest v. Homfray*, 5 Ves. 818.

VICE-CHANCELLOR. The case made by this bill against the defendant Duerr is, that he is the heir and personal representative of Frederick Duerr; and that, on the 13th of June, 1836, Frederick Duerr, by an agreement of that date, agreed to sell the land in question to Knott; and that the defendant Duerr is a trustee under this agreement, and bound to convey to the company. The company's equity, therefore, wholly depends upon the equity of the defendant Knott against the defendant Duerr; and the true question is, whether Knott could now enforce the agreement of 1836 against Duerr. Of course, it could not be enforced at this distance of time, independently of the question of possession; but, in order to make out the right to enforce it, this bill alleges, that, upon the execution of the agreement of 1836, possession was delivered to Knott, and that he has ever since continued in possession of the land; and I think the evidence sufficiently proves the fact, that possession was delivered to Knott upon the execution of the agreement; but I think it fails to prove that he has ever since continued in possession. Several witnesses have been examined as to the possession, but the evidence of most of them goes principally, if not wholly, to the possession before the agreement of 1836 was entered into. The material witnesses who speak to the possession after the date of that agreement state, in effect, that Knott used the land as garden-ground for two or three

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years; that it then lay waste for some time; and that Knott then brought some bricks and scaffold-poles, and put up a fence, with a board having his name upon it, apparently intending to build; and that this was done about Christmas, before the New Building Act, which I find was passed in the year 1844; but these witnesses also state, that soon afterwards Knott took away the bricks and poles, and the fence was broken down; and that the land then again laid waste for a long time—they say two or three years—before the railway was formed. There is also evidence, on the part of the plaintiffs, that Knott was rated as occupier of the premises from 1839 to 1847; but it appears by the bill, that, in October, 1847, and January, 1848, he was not rated; and the property was described in the rate-book as empty.

In this state of circumstances, I am of opinion, that Knott could not have enforced the agreement of 1836 against Duerr. He had never paid any part of the purchase-money; and although he had had possession under the agreement, I think it clear that he had abandoned the possession long before his agreement with the company was entered into; and it is scarcely less clear that the agreement of 1836 would never have been heard of but for the land having become valuable from the railway being about to pass over it. The jurisdiction in specific performance is discretionary; and, in my opinion, it would be a most unsound exercise of the discretion of the court to enforce a specific performance under such circumstances as exist in this case.

It was argued on the part of the plaintiffs, that Knott, having taken possession, and not having expressly repudiated the contract, could not have resisted specific performance at the suit of Duerr; and that as the agreement could be enforced against him, it could equally be enforced by him: but I do not agree either by the hypothesis on which this argument rests, or to the conclusion deduced from it. I think, that, under the circumstances of this case, the agreement of 1836 could not have been enforced by Duerr against Knott; and I think, moreover, that in cases of this nature the rights of the two parties to call upon the court to enforce the agreement are not coextensive. The right of each party depends upon his conduct; and the conduct of one may give him the right to apply to the court, while the conduct of the other may debar him from that right. I am of opinion, therefore, that this bill must be dismissed against the defendant Duerr; and as the plaintiffs have established no right to sue him, I think it must be dismissed against him with costs. From the course taken at the hearing, I presume there will be no difficulty, as between the company and the defendant Knott; but if there be, I think, that, as the company will not of course take a conveyance from him alone, the proper course will be to dismiss this bill against him without costs, and without prejudice; for this suit, as against him, is the consequence of his own claim.

In re Powell's Trust.

In the Matter of POWELL'S TRUST.¹

June 25, 1852.

Annuity — Arrears — Interest.

Interest not allowed on the arrears of an annuity, and the discretion of this court, on the question, is not affected by the stat. 3 & 4 Will. 3, c. 42, s. 28.

The cases of *Hyde v. Price*, and *Crosse v. Bedingfield*, referred to their special circumstances.

THE question was, whether interest ought to be allowed upon the arrears of an annuity of 31*l.* 2*s.* 6*d.*, granted by William Thorogood to Thomas Gould. The annuity was granted by a deed dated the 26th of April, 1834, and secured by an assignment of a reversionary interest in part of the funds in question in this matter, expectant on the decease of Ann Powell, and to which Thorogood was contingently entitled in the event of his surviving her. Ann Powell died on the 24th of November, 1851, and the annuity was then considerably in arrear. By the deed of the 26th of April, 1834, Thorogood granted the annuity in the usual form, payable quarterly during the lives of Thorogood and four other persons, and the life of the survivor of them; and the reversionary interest was assigned to Gould, upon trust for sale in case the annuity should be unpaid for a certain number of days beyond any or either of the days of payment, and to stand possessed of the money to arise by the sale upon trust to pay or retain the costs of the sale, and the costs and charges incurred by Gould by reason of the non-payment of the annuity, and the arrears and future payments of such annuity, or, at the option of Gould, to lay out the moneys in the purchase of another annuity of a similar amount. The deed contained a covenant for the payment of the annuity, and for the appearance, during the life of Ann Powell, of the persons for whose lives the annuity was granted, for the purpose of life assurance. And it was provided, that, if any extra premium should be required, the amount of the same, with interest, should be raisable under the trusts; and there was a proviso for redemption of the annuity. The annuity was also further secured by a warrant of attorney to confess judgment for 599*l.* and costs.

Freeling, J. H. Palmer, Southgate, and Shadwell appeared for the different parties. The cases of *Taylor v. Taylor*, 8 Hare, 120; *Booth v. Leicester*, 3 My. & Cr. 459; *Hyde v. Price*, 8 Sim. 578, and *Crosse v. Bedingfield*, 12 Sim. 35, were cited; and the stat. 3 & 4 Will. 4, c. 42, s. 28, enabling juries to give interest upon debts, was also referred to.

¹ 10 Hare, 134.

VICE-CHANCELLOR. I am of opinion that interest cannot be allowed upon the arrears of this annuity. I think the case is governed by the decisions in *Booth v. Leycester*, 3 My. & Cr. 459, which were approved by the present Lord Chancellor in *Martyn v. Blake*, 3 Dr. & War. 125.

It was attempted to support the claim for interest upon the provisions of the statute 3 & 4 Will. 4, c. 42, s. 28; but the statute does not appear to me to affect the question; for this court, before the passing of the statute, exercised some discretion as to allowing or not allowing interest on arrears of annuities; and I see no reason why the statute, which merely gives powers to juries to allow interest if they shall think fit, vesting some discretion in them, should be taken to have altered the rules by which the discretion of this court was guided; and besides, the case of *Booth v. Leycester* was decided after the passing of the statute.

The cases of *Hyde v. Price*, 8 Sim. 578, and *Crosse v. Bedingfield*, 12 Sim. 35, were also cited in support of the claim; but there were specialties in each of those cases. In *Hyde v. Price*, the claim was for interest, not on the arrears of the annuity as they accrued, but on the aggregate amount of the arrears at the death of the surviving grantor of the annuity, as due upon the judgment; and for many years after the death of the surviving grantor there had been no person who could have been sued upon the judgment. There had also been a decree to take the account with interest; and the case too was decided before the decision upon the appeal of *Booth v. Leycester*. In *Crosse v. Bedingfield* it might well be considered that the debtor, by setting up the destruction of the bond, had unjustly impeded the recovery of the annuity. These cases must, I think, be referred to the special circumstances which attended them; for, in the later case of *Jenkins v. Briant*, 16 Sim. 272, the late Vice-Chancellor of England adopted the decision in *Booth v. Leycester*.

The covenant with reference to insurance was also referred to in support of the claim; but that covenant appears to me to tell more against than in favor of the claim; the reservation of interest upon any moneys which might be paid by way of premium upon the policy, showing that, where the parties contemplated the payment of interest, they made it the subject of express stipulation. My decision, therefore, is, that interest is not payable upon the arrears of this annuity.

Tidd v. Lister. Bassil v. Lister.

TIDD v. LISTER. BASSIL v. LISTER.¹

February 10 and 11, June 25, and July 6, 1852.

Husband and Wife — Property of Wife — Maintenance — Marshaling Encumbrances.

A married woman, whose husband did not maintain her: —

Held not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life.

As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby purchasers would be involved in inquiries into the relations between husband and wife, their property, and means of maintenance.

Distinctions between the cases in which a wife takes an absolute interest in her property, and those in which she takes a life-interest only, and between cases of an assignment by the husband of the wife's property to his general assignee on his bankruptcy or insolvency, and of an assignment to a particular assignee for value.

Moneys coming to the hands of the receiver in a cause in which the husband and wife are parties, might be considered as not reduced into possession by the husband; but where the husband has created encumbrances on the property in which he became interested in right of his wife, and the court has ordered the moneys to be applied in favor of the encumbrancers, the effect is to divest the title, and reduce into possession the moneys which were the subject of the order.

One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was

Held, that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend.

Two petitions, presented by Elizabeth Tidd, the first in the lifetime of her husband, William Tidd, the second, after his decease. The claim of the petitioner arose out of the following facts: Josias Lister, by his will, dated in 1803, gave all his real and personal estate to trustees, amongst whom were his sons, W. Lister and J. Lister; and he directed that his wife Elizabeth, and his daughter Elizabeth, during their joint lives, or the survivor of them, should have and occupy the house he resided in, the furniture, &c.; that the aforesaid devise should not extend to any money, bank-bills, bonds, or notes of hand, that might be in and about the house, and he proceeded: "And that all such, with my other personal property that I may leave, with any expectancy, I direct and will, that it may be put out into government security, the interest whereof, with all the rents and profits of freehold, copyhold, or leasehold property that may happen to come in; that the proceeds, after all my just debts and funeral expenses are paid, and also the insurance from loss or damage by fire of the whole of the premises that I may die possessed of, and all policies of insurance on lives; after all which has been performed, then I give

¹ 10 Hare, 140.

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the remainder of my profits, rents, or interests, or in expectancy, of whatsoever kind, to my wife and daughter Elizabeth, for their lives, or the survivor of them; but first paying out of the said profits, rents, or interest, as before-mentioned, two annuities of sixty guineas each to my two sons, William and John; and should either of them die before my wife and daughter, in that case, one moiety of the said annuity should be enjoyed by my wife and daughter, and the other by my surviving son; that, should both die without leaving issue, then for the whole of my property, both real and personal, or expectancy, to revert back to my wife and daughter, and to be at their, or the survivor of their, disposal, for ever; and if, on the contrary, my son or sons should survive my wife and my daughter, on such an event happening, it is my will, that the whole of my real and personal property and expectancy should be equally divided between them, share and share alike."

The testator died on the 1st of November, 1803, leaving his wife and his daughter, the petitioner, who was then unmarried, surviving him. His property consisted of freehold and copyhold estates, and of personal estate. In 1805, the petitioner, the daughter, married W. Tidd; and it did not appear that any settlement was made of her interest in the property of the testator. In 1819, the testator's widow died.

In March, 1820, W. Tidd and his wife (the petitioner) filed their bill for the execution of the trusts of the will. By the decree in the cause, dated the 19th of December, 1820, accounts were directed to be taken; and it was referred to the Master to appoint a receiver of the freehold and copyhold estates; and the receiver was ordered, out of the rents and profits, to pay the premiums on three policies of life insurance left by the testator, and also on the policies of insurance on the houses, and any additional premiums that might be payable; and the receiver was directed from time to time to pass his accounts, and pay in the balances which should be reported due from him; and the appointment of such receiver was to be without prejudice.

An order was afterwards made in the cause, dated the 6th of May, 1822, by which it was ordered, that the defendant, William Lister, should, after retaining his costs, pay to W. Tidd and Elizabeth his wife the residue of a sum of 367*l.*, in his hands, and should transfer into court 177*l.* 8*s.*, 4*l.* per cent. stock; and that the defendant, William Lister, who was one of the testator's executors, should receive the dividends to accrue on the stock previous to such transfer, and pay the same to W. Tidd and Elizabeth his wife; and that the dividends to accrue on the 177*l.* 8*s.* stock should be paid to the receiver; and that the receiver should pay the balance of the rents and profits of the estates, and of the dividends which should be reported due from him, after deducting the premiums payable on the several policies of insurance to W. Tidd and Elizabeth his wife, or to Elizabeth Tidd alone, in case she should survive her husband, during her life, or until the further order of the court. By this order the parties were let into the receipt of the income, subject to the annuities and premiums directed to be paid thereout. And a similar order, dated the

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21st of November, 1827, was made upon the appointment of a new receiver.

In the mean time, by deeds of lease and release, dated in September, 1820, the release made between William Tidd and Elizabeth his wife of the first part, H. Blegborough of the second part, and J. Arundel of the third part, and by means of a fine levied by W. Tidd and Elizabeth his wife, the freehold estates of the testator had been conveyed to Blegborough for the life of Elizabeth the wife, for securing an annuity of 127*l.* 10*s.*; and, by these deeds, W. Tidd covenanted for the surrender of the testator's copyhold estates, for better securing the annuity; and (as stated at the bar) the testator's personal estate was thereby purported to be assigned for further securing it.

By an order, dated the 18th of January, 1834, it was ordered, that, out of any moneys in the hands of the receiver, and which might thereafter come to his hands, in respect of the rents, profits, and dividends of the real and personal estate of the testator, after providing for the several payments directed to be made by the order of the 6th of May, 1822, the receiver should pay to Blegborough the sum of 120*l.* 10*s.*, the arrears due to him upon his annuity, and the costs of the application; and that, after first providing for the several payments directed to be made by the order of the 6th of May, 1822, the receiver should pay to Blegborough, out of the rents, profits, and dividends of the said real and personal estate, the annuity of 127*l.* 10*s.*, as the same should become due and payable. Blegborough's annuity was afterwards assigned to H. and J. Phillips; and by an order of the 1st of November, 1834, the annuity was ordered to be paid to them instead of to Blegborough.

The life-interest of Elizabeth Tidd in the testator's freehold estates was also, previous to March, 1834, charged by deed and fine, in favor of Mary Tidd, with the sum of 2,100*l.* and interest, and the premiums on a policy of insurance for that amount, which had been effected on the life of Elizabeth the wife. The deeds creating this charge had contained a covenant for the surrender of the testator's copyhold estates, but no surrender was ever made in pursuance thereof.

By an order of the 21st of March, 1834, the receiver was directed, out of the moneys then in his hands in respect of the rents and profits of the real estate of the testator, after providing for so much of the several payments directed to be made by the previous orders as the moneys then in his hands on account of the personal estate of the testator would not extend to satisfy, to pay to Mary Tidd the sum of 613*l.* 12*s.*, due to her on the 25th of October, 1833, for arrears of interest on the 2,100*l.*, and also the costs of the application, or so much thereof as such moneys should be sufficient to satisfy; and the receiver was ordered thereafter, out of the rents and profits of the real estate, after providing for so much of the several payments directed to be made as the moneys from time to time in his hands on account of the personal estate would not extend to satisfy, to pay the annual premiums on the policy on the life of Elizabeth Tidd, as therein mentioned, and out of the residue of such moneys, from time

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to time in his hands, to pay to Mary Tidd the interest which should accrue on the 2,100*l.*, and also so much of the 613*l.* 1*s.* 2*d.*, and the said costs, as should not be paid by the means therein mentioned.

Mary Bassil afterwards became entitled to the benefit of Mary Tidd's securities; and thereupon an order, dated the 4th of August, 1837, was made in the cause in favor of Mary Bassil, which was similar to the order of the 21st of March, 1834, in favor of Mary Tidd.

John Brettel, one of the persons on whose life the testator had effected a policy of insurance, having died, and the moneys due upon the policy effected on his life having been received by William Lister, the executor, another order was made on the 4th of June, 1839, by which he was ordered to pay the sum into court; and it was ordered, that, when paid in, the interest, and interest to accrue due on the stock when transferred, should be paid to the receiver, to be applied by him, together with the first mentioned interest, after satisfying the costs as before directed, in aid of the moneys receivable by him pursuant to the directions of the decree and the several orders relating to the interest and dividends of the personal estate of the testator.

In this stage of the case, questions were raised by Mary Bassil as to the validity of the trust created by the testator's will for keeping on foot the policies of insurance, and also as to the priority of Blegborough's annuity. These questions were afterwards heard and disposed of. See 9 Hare, 177; s. c. 6 Eng. Rep. 157.

Pending these proceedings, the first of these petitions was presented by Elizabeth Tidd, by her next friend, her husband being then living. In addition to the facts before stated, the petition alleged that the freehold property of the testator consisted of certain lands and hereditaments at Wellingborough, and of a messuage in Islington, producing an annual income of 154*l.* 4*s.* That part of the copyhold property, consisting of certain houses and land at Finchley, was lately sold to the Great Northern Railway Company for 1,530*l.*, which was paid into court and invested, in trust in the cause, in 1,707*l.* 2*s.* 3*d.* consols. That the copyhold property of the testator consisted of lands and hereditaments at Hornsey and Finchley, producing an annual income of 198*l.* 8*s.* That the personal estate, other than such part thereof as had been set apart to secure the annuities payable under the will, consisted of certain sums mentioned, producing a clear annual income of 32*l.* 17*s.* 1*d.* That the total annual income arising from the testator's real and personal estate (after payment of the annual premiums and other sums of money now payable under the decree of the 19th of December, 1820,) amounted to 359*l.* 5*s.* 11*d.* That the whole of the income since the death of Elizabeth Lister had been received by the petitioner's husband, W. Tidd, and his creditors and encumbrancers. That, since 1826, W. Tidd had been in insolvent and very indigent circumstances, and had not in any manner contributed to the maintenance or support of the petitioner; and the whole of the income arising from the testator's real and personal estate had, in fact, been received by the encumbrancers and

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creditors of W. Tidd, and the petitioner had been left, and was, wholly destitute; that W. Tidd was then receiving parochial relief, and an inmate of the workhouse. That the petitioner had had issue by her husband five children, three of whom, one daughter and two sons, were then living and unprovided for. That the petitioner was and had been for many years entirely supported by her daughter, who had hitherto obtained her living by dressmaking and needlework; but that her earnings were very precarious, and oftentimes insufficient to provide herself and the petitioner with the common necessities of life. That the petitioner was of the age of sixty-six years, and confined to her bed by illness, and without the means of providing medical advice; and the petitioner, therefore, prayed that the receiver might be directed, notwithstanding the said several orders, forthwith to pay to the petitioner, out of any moneys in his hands, the sum of 50*l.*, upon her sole receipt, for her immediate necessities and support, such payment to be made without prejudice to the rights or claims of all parties. That the receiver might be directed, notwithstanding the same orders, to pay the residue of the income arising from the testator's freehold, copyhold, and personal estates respectively, to the petitioner, for her separate use, and upon her sole receipt, for her support and maintenance during the life of her husband; or if it should appear that the estate, right, and interest of the petitioner of and in the freehold hereditaments, or any part thereof, had been duly and effectually conveyed by the petitioner, so as to defeat her right to a provision out of the income arising from the same, then that the receiver might be directed, after providing for such payments as aforesaid, to pay the whole income arising from the copyhold and personal estates of the testator, and the income arising from such part, if any, of the freehold hereditaments as should not have been so conveyed, to the petitioner, as aforesaid; or that the court would approve of a proper sum to be allowed out of the said testator's freehold, copyhold, and personal estates, for the support and maintenance of the petitioner during the life of her husband, having regard to the circumstances; and that, in the mean time, the receiver might be directed to discontinue the several payments directed to be made by the several orders thereinbefore stated; and that such orders might, if necessary, be reheard and varied or discharged.

The petition came on to be heard in August, 1851, and was then ordered to stand over, it being supposed that the decision upon it might be affected by a case which was standing for judgment before the Lord Chancellor.

Whilst the first petition was thus standing over, William Tidd, the husband of the petitioner, died; and thereupon the second petition was presented, stating, in addition to what was stated by the former petition, that W. Tidd was, at the time of his death, a pauper lunatic in St. Pancras Workhouse, and that he had not, since 1820, in any way contributed to the maintenance and support of the petitioner: That the petitioner was advised, that on the death of her husband W. Tidd, all his right and interest, and all the right and interest (if any) of Mary Basil, and of any other person claiming through or under W.

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Tidd, of, in, or to the income arising from the testator's freehold, copyhold, and personal estate, ceased; and that the petitioner became entitled to receive such income, subject to the payment of the premiums on the policies effected by the testator on the lives of the said W. Lister and J. Lister respectively, and of the annual sum or sums of money required for insuring the houses against fire, and to the annuities given by the will, and subject also, as to the income arising from the freehold estate, to the payment to H. and J. Phillips of the annuity of 127*l.* 10*s.*; and after stating that the receiver had paid that annuity, and had also paid to Mary Bassil the annual premium of 106*l.* 9*s.* 9*d.* in respect of the policy effected by her on the life of the petitioner, including such annual premium as became due in July, 1851, it stated that the receiver had in his hands 290*l.* 17*s.* 8*d.*, being the balance of his receipts and payments in respect of the testator's freehold, copyhold, and personal estate, from the 29th of September, 1850, to the 29th of September, 1851: That the receiver had not paid any sum of money on account of the testator's freehold, copyhold, and personal estate since the 29th of September, 1851: That, under the circumstances, the 290*l.* 17*s.* 8*d.* ought to be paid to the petitioner; but that the same was claimed by Mary Bassil: That two several sums of 2,100*l.* bank 3*l.* per cent. annuities had been set apart to answer the annuities of sixty guineas payable to W. Lister and J. Lister: That those annuities were by the will charged upon and made payable out of the incomes arising from the testator's freehold, copyhold, and personal estate respectively, and not solely out of the income of the personal estate; and that the sum of 42*l.* 15*s.* 7*d.* was the proportion or amount of the annuities which ought to be paid out of the income arising from the testator's freehold estate. The petition prayed that the costs might be taxed and paid out of the balance in the receiver's hands, in respect of the income of the testator's freehold, copyhold, and personal estate, received by him previously to the 29th of September, 1851; and that the receiver might be directed to pay the residue of that sum to the petitioner, and out of the rents and profits and income of the freehold, copyhold, and personal estate, to be received by him as from the 29th of September, 1851, ratable and in proportion to the respective amounts, from time to time, to pay the annual premiums on the policies of insurance; and that the receiver might be directed to pay the income of the testator's copyhold and personal estate, which should remain in his hands after payment of the proportionate amounts of such sums to the petitioner for her life; and that the receiver might also be directed to pay to her the sum of 42*l.* 15*s.* 7*d.* out of the rents of the freehold estates, and out of the residue of those rents to pay Phillips's annuity.

Stuart and Leach, for the petitioner, Elizabeth Todd, upon the first petition, insisted on her equity to a settlement, or a provision for maintenance out of her life-interest in the property. The authorities now decided that any party claiming under the husband, whether a general or particular assignee, stood in the same situation as the husband, and took subject to all the equities of the wife. The principle

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laid down by Lord Alvanley in *Pryor v. Hill*, 4 Bro. C. C. 138, and *Macaulay v. Philips*, 4 Ves. 15, being fully established, it followed, as a necessary corollary, that the assignee for value, of the life-estate of the wife, could not be in a better position than the assignee for value of a capital sum. Both took equally under the husband, subject to the wife's equity, whenever she might choose or need to assert it. That there was no distinction between a life-interest and capital would clearly appear, when it was considered that the court did not give the capital to the wife in any case, but merely a life-interest in that capital. *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Hanson v. Keating*, 4 Hare, 1; *Wortham v. Pemberton*, 1 De G. & S. 644; *Ashby v. Ashby*, 1 Coll. 553; *Wilkinson v. Charlesworth*, 10 Beav. 324; *Gardner v. Marshall*, 14 Sim. 575; *Gilchrist v. Cator*, 1 De G. & S. 188; *Gredy v. Lavender*, 13 Beav. 62; *Stiffe v. Everitt*, 1 My. & Cr. 37; and *Whittle v. Henning*, 2 Ph. 731, were also cited. Upon the second petition, they contended, that the wife was entitled by survivorship, the property not having, as they argued, been reduced into possession by the husband. And lastly, they contended that the freehold and copyhold estate should bear a ratable proportion of the charges, and that they should not be thrown in the first instance on the personal estate.

Bethell, Rolt, and Eddis for the plaintiff, Mrs. Bassil.

Walker and Hardy for Messrs. Phillips.

The cases of *Stanton v. Hall*, 2 Russ. & My. 175; *Elliott v. Cordell*, 5 Madd. 149, and *Vaughan v. Buck*, 1 Sim. (N. S.), 284, were mentioned on the argument for the respondents.

Leach replied.

VICE-CHANCELLOR. The question raised by the first petition is, whether a married woman, whose husband does not maintain her, is entitled, as against a particular assignee for valuable consideration of the husband, to an allowance for her maintenance out of the income of real and personal estate, to which she was entitled in equity for her life. This question seems to have been first suggested by Sir William Grant in *Wright v. Morley*, 11 Ves. 12, where, after referring to Lord Alvanley's opinion on the general question, whether there is any difference between an assignment for valuable consideration and by operation of law, he says: "If it stood there, there is no doubt the husband has a right to deal with it so long as he maintains her; and there is no doubt of his right to make a specific disposition if he maintained her." That leads to the question, whether, in case of abandonment, by the husband ceasing to maintain his wife, there is an equity for her to have her own life-interest laid hold of by this court, supposing it not reduced into possession by the husband, being still in the hands of the trustees. One question is, whether that is settled merely as between husband and wife, and putting third persons out of con-

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sideration; if so, the second point is, whether this equity prevails, where, previously to the abandonment, the husband has made an assignment of his wife's interest, or any part of it. That question, so far from being decided, has not even been made the gist of a case. It therefore deserves a great deal of consideration." 11 Ves. 18. In that case, however, the question was not necessary to be and was not decided; but it was afterwards fully argued before and considered by Sir John Leach in *Elliott v. Cordell*, 5 Madd. 149, and his decision was against the right of the wife; and that decision was approved and acted upon by Lord Brougham in *Stanton v. Hall*, 2 Russ. & My. 175. It would require, therefore, some very clear principle, or some very decisive authority, to warrant me in arriving at a different conclusion.

It was strongly argued in this case, as it was in *Elliott v. Cordell*, 5 Madd. 149, that there could be no distinction between the cases in which the wife took a life-interest only, and those in which she took an absolute interest, in which latter cases her right to a settlement was fully established against the assignee of her husband for valuable consideration; and that there could be no distinction between the particular assignee for value of the husband, and his general assignee in bankruptcy or insolvency: but there are distinctions between these cases which cannot be disregarded.

In the cases where the wife takes an absolute interest, the provision is for her and her children. She cannot claim it for herself alone. In the cases where the wife takes a life-interest, the provision is for her separate benefit, independently of the children, a distinction pointed out by Sir William Grant in *Wright v. Morley*. Again, in the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of her husband; in the cases where she takes a life-interest only, her right to a provision for herself arises from the non-fulfilment by him of his obligations, and is wholly dependent upon his acts and conduct. In the cases too where the wife takes an absolute interest, the purchaser takes subject to a well-known and settled equity; but where the wife takes for life only, the equity by which it is said the purchaser must be bound, may not exist at the time of his purchase, and, depending as it does on the conduct of the husband, may never come into existence: and in this respect also there is a great distinction between the particular assignee for value and the general assignee; for in the case of the general assignee the very bankruptcy or insolvency on which his title is founded creates the right against him. Considering the question without reference to the authorities, it must, as I conceive, resolve itself into this point: ought a court of equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that he who comes into equity must do equity, the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded.

In determining this point, the inconveniences which would ensue

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from the court's acting upon the rule to which I have referred, must not, I think, be thrown out of view. Purchasers would become involved in inquiries into the relations between husband and wife, the extent of their other property, and their other means of maintenance; and the life-interests of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred.

It is to be considered, then, whether those decisions are affected by subsequent cases. It does not appear to me that they are. Many cases were cited in the argument, but they were principally cases in which the wife had taken an absolute interest; and in those in which she had taken a life-interest, the question was between her and the general assignees of her husband. No case was cited in which the question had been between the wife and the assignee of the husband for value. *Vaughan v. Buck*, 1 Sim. (N.S.) 284; s. c. 3 Eng. Rep. 135, before Lord Cranworth, was relied on; but that was a case between the wife and the general assignee of the husband. Much reliance was also placed on the observations of Lord Langdale in *Wilkinson v. Charlesworth*, 10 Beav. 324; but that was a question between the representative of the husband and the wife surviving; and Lord Langdale's observations seem to have been directed against what had fallen from the late Vice-Chancellor of England in *Vaughan v. Buck*, 13 Sim. 404, as having indicated a doubt whether the wife could in any case be entitled to a provision for maintenance out of her life-interest. His lordship could not, I think, have intended to say, that, in every case, and as against every person, she would be so entitled; for in *Wright v. Morley*, 11 Ves. 17, to which he refers, Sir William Grant puts the wife's right to a provision on the absence of her husband and his having left her unprovided for, and directed an inquiry as to these points before he would make the order in favor of the wife. Indeed, I can find no case in which a wife has come to the court for such a provision except under special circumstances; and certainly no case in which she has succeeded in obtaining it against an assignee for value of her husband.

It was attempted to maintain this petition upon the ground that the wife's interest was reversionary within the principle of *Stiffe v. Everitt*, 1 My. & Cr. 37; but that case goes no further than that the wife's interest, after the determination of the coverture, might be deemed to be reversionary, and does not therefore affect the question as to the income accruing during the coverture. My opinion therefore is, that the first of these petitions must be dismissed; but, having regard to what fell from the court in *Wilkinson v. Charlesworth*, 10 Beav. 324, I must dismiss it without costs.

The first question raised by the second petition is as to the right of the petitioner to a sum of 290*l.* 17*s.* 8*d.*, in the hands of the receiver,

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being the balance of his receipts and payments in respect of the testator's freehold and copyhold and personal estates, from Michaelmas, 1850, to Michaelmas, 1851. The petitioner claims to be entitled to this sum by survivorship; but I am of opinion that she is not so entitled. The question depends upon whether these moneys are to be considered as having been reduced into possession by the husband; and if the case had rested upon the moneys having come to the hands of the receiver, I think it would have been difficult for the encumbrancers to have resisted the petitioner's claim to them; but these moneys have been ordered by the court to be applied in favor of the encumbrancers, which is in effect for the use of the husband, by whom the encumbrances were created; and I think the orders of the court must be considered to have divested the title of the petitioner and destroyed her right by survivorship.

Upon this part of the case a question of marshalling was discussed: Whether the payment which had been made on account of Blegborough's annuity ought not to be referred to the income of the personal and the rents of the copyhold estate, so as to leave the 290*l.* 17*s.* 8*d.* in the hands of the receiver applicable for the benefit of Mrs. Bassil; but my opinion being, that the sum in question does not survive, and is applicable according to the orders already made by the court, this question does not arise. The petitioner is not of course bound by her husband's covenant for the surrender of the copyholds, or by his assignment of her interest in the personal estate.

The remaining question upon the second petition is, whether the petitioner is entitled to have the premiums upon the policies of insurance and the annuities apportioned upon and borne by the rents and income of the freehold estates, the copyhold estates, and the personal estate, *pro rata*; or whether the personal estate is primarily liable for these payments. And, upon this point, I consider the case to be bound by the decision of the House of Lords in *Boughton v. Boughton*, 1 H. L. Cas. 406, where it was held, that the primary liability of the personal estate was not altered by a trust for the payment of legacies out of the rents and profits of real and personal estate. I see no reasonable ground of distinction between that case and the present; and I feel myself bound, therefore, to hold, that the personal estate is, in this case, primarily liable for these payments.

There was no argument upon the point, how the deficiency of the income of the personal estate for the payment of the premiums ought to be made good; and the amount is so inconsiderable, that I think the parties will be well advised not to agitate the question, but to allow it to be taken out of the income of the copyholds.

The order, therefore, will be — to dismiss the first petition, without costs; to give no directions as to the 290*l.* 17*s.* 8*d.*, leaving it to be dealt with according to the former orders; to order the receiver to keep distinct accounts of the rents of the freeholds, and of the copyholds, and of the income of the personalty; to direct the rents of the freeholds, from the death of W. Tidd, to be applied, first, in payment of Phillips' annuity and of the costs of the petitions, and then the surplus to be paid to Mary Bassil, for the purposes mentioned in

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the former orders; to direct the income of the personalty, and (the parties not objecting) the rents of the copyholds, from the death of William Tidd, to be applied first in payment of the premiums, and then the surplus to the petitioner.

The petitioner's costs of the petitions must be paid out of what is coming to her, and Mrs. Bassil's must be added to her encumbrance.

A question was then raised, as to the right of Mrs. Bassil to have the charge to which the Phillips's were entitled, as against both the freehold and the copyhold estate, marshalled, so as to satisfy that charge out of the copyholds, as far as they would extend, leaving Mrs. Bassil to realize her charge out of the freeholds, so far as they should not be required for the payment of the annuity to Messrs. Phillips, or, in other words, on the right of Mrs. Bassil, whose charge extended to the freeholds only, to stand in the place of the Phillips's as to the copyholds, to the extent in which they should take satisfaction out of the freeholds.

July 6. VICE-CHANCELLOR. I have looked through the cases on this subject. The reason I suspended giving my opinion was, that several cases had been decided since *Aldrich v. Cooper*, 8 Ves. 382, and I did not know whether those cases had affected it. On looking into the cases, I am satisfied that the decision in *Aldrich v. Cooper* is not affected by the subsequent cases; and I am of opinion, that, assuming the security of the Phillips's to be a good security on the copyhold property, (which, if there be any question, must be verified by affidavit,) there must be a marshalling in the present case; and that Mrs. Bassil is entitled to have Messrs. Phillips paid out of the copyhold estate, so as to leave the freehold estate for her; and then the petitioner, Mrs. Tidd, will take any surplus of the income of the copyholds.

YOUNG v. HODGES.¹

November 9 and 10, and December 1, 1852.

Multifariousness — Administrator — Accounts of two Estates in one Suit.

Cases in which the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit.

THE circumstances of this case were very special and complicated, and are not necessary to be stated for the purpose of explaining the

¹ 10 Hare, 158.

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rule laid down in the judgment with reference to the cases in which it is proper to administer two estates in the same suit. See *Powell v. Cockerell*, 4 Hare, 557.

Rolt and Cairns for the plaintiff; and

W. P. Wood, Baily, Collins, and Freeling for the defendants.

VICE-CHANCELLOR. At the hearing of the cause, the frame of the record, as involving the accounts of the estates both of J. Webster, the father, and J. Webster, the son, in one suit, was much objected to on the part of the defendants, the representatives of Forshaw; but this objection, having been raised at the hearing of the cause, and not by demurrer for multifariousness, is to be disposed of according to the discretion of the court; and I see nothing in the case which ought to prevent the court, in the exercise of its discretion, from dealing with both the estates in this suit. I think, indeed, that these estates have been so dealt with that it would have been difficult to maintain the objection of multifariousness, had it been taken by demurrer. Where the residuary estate of one testator devolves upon another testator, the executors of the first testator may, I think, well be joined in a suit for the administration of the estate of the second testator, in all cases in which there have been such dealings between the two sets of executors as would prevent the rights of the parties suing from being fully and fairly worked out, if the suit for the administration of the estate of the first testator were brought by the executors of the second; and this case must, I think, have been held to fall within that rule. I am of opinion, therefore, that the usual accounts of the estates of both these testators must be taken in this suit.

The plaintiffs further insisted, that there should also be an account of the estate of J. Webster, the elder, received by the defendant, Hodges, who was the executor of J. Webster, the younger, but did not represent the estate of J. Webster, the elder; and I am of opinion that this account must be directed. It does not indeed fall within the usual accounts; but, looking to the answer and the evidence, I think that this defendant has intermeddled with the estate of J. Webster, the elder, to such an extent that the account is clearly due.

PAGE v. COX.¹

November 18, 1851, and April 20, 1852.

Trust — Contract — Partnership — Will.

A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to Sarah his wife; and after her decease, to Mary, his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of the will, Mary married, and her husband and the testator entered into partnership, under articles, which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision, claimed his interest in the partnership: —

Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share.

A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favor of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist.

THOMAS PAGE, the testator, carried on the business of a boot and shoe maker, and, at the date of his will, he was solely interested in that business. By his will, dated the 18th of August, 1832, he gave certain specific legacies, and devised and bequeathed the residue of his real, leasehold, and personal estate unto and to the use of the defendant, Cook, and another, upon trust to convert into money such parts of his residuary personal estate as should not consist of leasehold premises or money in the funds, and to invest the produce thereof, and the ready money of which he should die possessed, as therein mentioned, and during the life of his wife, Sarah Page, to pay the rents and profits of his said real and leasehold estates, and the dividends and annual produce of such investments, and of all such stocks, funds, and securities, as he might be possessed of at the time of his decease, unto the said Sarah Page, for her separate use, without power of anticipation; and, after her decease, during the life of Mary Elizabeth Green, his wife's sister, to pay the said rents and profits, dividends, and annual produce unto the said Mary Elizabeth Green, for her separate use, without power of anticipation; and after the decease of the survivor of Sarah Page and Mary Elizabeth Green, to convey, assign, and make over the said real and leasehold estates,

¹ 10 Hare, 163.

stocks, funds, and securities, and other his residuary personal estate, to William Page, his heirs, executors, administrators, and assigns.

Some time after the date of the will, and before December, 1839, Mary Elizabeth Green married James Shattock; and on the 24th of December, 1839, the testator entered into partnership with Shattock. Articles of partnership, dated the 24th of December, 1839, were entered into between them, whereby, after reciting that Page had agreed to take Shattock into partnership with him in his said business, it was agreed that the partnership should commence on the 25th of December, 1839, and continue for the term of their joint lives, determinable on twelve months' notice by either party; that the present stock in trade of Page, including his shop fixtures, tools, and implements of trade, which had been valued at the sum of 1,000*l.*, should be taken as capital to that amount brought into the partnership by Page; that any future capital required should be brought in by the partners in equal moieties; that during the continuance of the partnership the stock in trade should not be reduced below 1,000*l.* That Shattock should devote his whole time and attention to the business; but Page should not be required to devote his whole time or attention to it. The articles also contained a proviso, that, in case Page should die during the partnership, leaving a widow him surviving, such widow might, if she should think fit, continue to carry on the partnership business with Shattock, upon the terms and conditions contained in the articles, in the same manner as Page could have done whilst living; and such widow should be entitled to Page's share and interest of and in the profits of the business, and also to the share and interest, including excess of capital (if any) of Page, of and in the property, stock, credit, and effects of the partnership; or if Page should die leaving no widow, or, leaving such, she should die, or should not desire to enter into the partnership business, or if in case Shattock should die during the said partnership, then the surviving partner should take upon himself the whole of the partnership property, stock; and effects, and give sufficient security to the personal representatives of the deceased partner for their indemnification against the debts due from him as surviving partner, and for the due accounting with and paying to such representatives, within six months after the death of such deceased partner, of his share, including excess of capital (if any) of and in the property, credits, and effects of the partnership, the same to be ascertained; and the accounts of the partnership in case of disagreement to be adjusted by arbitrators, to be appointed in manner thereafter mentioned; and upon the performance, by the surviving partner, of the terms and conditions of the articles on his part, the personal representatives of the deceased partner should release, assign, or otherwise assure to the surviving partner all the deceased partner's share and interest in the partnership property, stock, and effects; and that the expense of and attending all bonds, deeds, and other instruments necessary for effecting the purposes aforesaid, should be sustained equally by the surviving partner and the representatives of the deceased partner.

The testator died on the 4th of September, 1840, leaving Sarah

Page, the wife mentioned in his will, his widow; and all the executors proved his will. On the death of the testator, his widow claimed under the articles of partnership to become a partner with Shattock, and to be entitled to the testator's share in the profits and capital of the business; and Cook, as executor of the testator, then also claimed to be entitled to the testator's share and interest in the partnership business. The widow, however became partner with Shattock in the business, and continued in partnership with him until April, 1841; at which time she sold to Shattock what had been originally the testator's share of the capital and stock for 1,000*l.*, and of the good will for 200*l.*; and immediately afterwards she married Philip Cox.

The bill was filed by William Page, the party entitled in remainder under the testator's will against Cox and his wife, and Shattock and his wife, and against Cook, the surviving trustee of the will, for the administration of the testator's estate; and the sole question discussed at the hearing was, what were the rights and interests of the parties in the testator's share and interest in the business; the plaintiff contending that the defendant, Sarah Cox, the testator's widow, did not become entitled to it under the articles of partnership; and that, if she became entitled to it under the articles, she was bound to elect between her interest in it and the other provisions made for her by the will.

Bethell and *Lewin*, for the plaintiffs; and *Prior*, for the defendants, Shattock and his wife.

No trust was created of the share of the testator on behalf of his widow, nor could it be regarded as in the nature of an advancement for her benefit. Nothing was done to preserve the partnership property from any disposition which the testator might make of it by any act in his lifetime, or by his will; and the provision in the articles, such as it was, did not point to any particular person. It was a stipulation, that "any widow he might leave should be admitted as a partner." There was, therefore, no certainty of subject or of object to create a trust. The purpose of the clause was to enable the partner to bequeath to his widow the right of becoming a partner, but not to make her necessarily a partner. *Pigott v. Bagley*, M'Clell. & Younge, 569. One partner covenanting with another, that a son or other member of his family should become a partner in case of his own decease, did not thereby give the son or other person designated a right, as against the representatives of the deceased partner, to become a partner in his stead, if he made no disposition of his share in favor of such person. *Colyear v. Countess of Mulgrave*, 2 Keen, 81. The articles of partnership did not amount to any assignment or disposition of the testator's share to which the court could give effect. *Edwards v. Jones*, 1 My. & Cr. 226; *Meek v. Kettlewell*, 1 Ph. 342; s. c. 1 Hare, 464. There was, moreover, nothing in the case which even purported to be a donation in favor of the wife. The testator did no more, dealing with his partner, than reserve a power to himself to give his widow the benefit of the partnership contract. He might have given this benefit by his will, but he did not: on the

contrary, the will, speaking from the time of his death, made a different disposition of his property, including the partnership property. It could not be contended, that the partnership articles amounted to a revocation or ademption of the gift by the will.

Roll and *Cole*, for the defendants, Cox and his wife, contended, that the articles of partnership created a trust on behalf of the testator's widow, in respect of his share of the partnership property. *Ellis v. Nimmo*, L. & G. temp. Sugd. 333; *Christ's Hospital v. Budgin*, 2 Vern. 683; *Dummer v. Pitcher*, 2 My. & K. 262.

The case of *Kekewich v. Manning*, which had been argued on appeal before the lords justices, and then stood for judgment, was also cited; and the Vice-Chancellor reserved his decision until the judgment of the lords justices was pronounced. See 1 De G., Mac. & G. 176; s. c. 12 Eng. Rep. 120.

VICE-CHANCELLOR. As to the first point, the right of the widow under the articles, I am of opinion that she became entitled under them to the testator's share in the business. This question depends wholly on the effect of the articles. Up to the time of the articles being executed, the testator had the sole legal interest in the business, and in the capital and stock embarked in it. Upon the articles being executed, that legal interest vested in both partners, and became subject, upon the death of either of them, to vest in the survivor. The clause upon which this question depends takes up that event, and provides for its happening either by the death of the testator or by the death of Shattock; and, in the case of its happening by the death of the testator, refers to several contingencies under which it may happen — the testator's leaving or not leaving a widow, — the widow dying, — her electing to continue or not to continue the business. In all events contemplated by this clause, the interest of the deceased partner is dealt with by it, and is so dealt with in connection with the interest of the surviving partner; and the effect of the clause cannot, I think, be stated lower than that it was an agreement by both parties, that, upon the death of either of them, his share should be dealt with according to the provisions which the clause contains.

We have to consider, then, what is the effect of such an agreement. Is it not to create an obligation in equity upon the surviving partner, in whom the legal interest would be, and was contemplated as being, vested; and in what respect does such an obligation differ from a trust? I see no difference between them; and I am of opinion, therefore, that, in the event which happened, these articles created a trust in favor of the widow; and I have less difficulty in so holding, as I consider it to be now settled in *Kekewich v. Manning*, 1 De G. Mac. & G. 176; s. c. 12 Eng. Rep. 120, that, in cases of this nature, the court is to regard the substance and effect and not the mere form of the instrument; and that a trust may well be created, although there may be an absence of any expression in terms importing confidence.

It was argued that this was a mere case of contract between two persons for the benefit of a third party, and that the third party could

not enforce such a contract; and *Colyear v. Countess of Mulgrave*, 2 Keen, 81, was cited upon that point. But it seems to have been considered in *Kekewich v. Manning*, that that case was not free from doubt; and, at all events, I think it is distinguishable from the present case. In that case, the creation of the fund on which the trust was to be fixed, in part depended upon the enforcement of the covenant, and neither of the parties had the legal interest in the other part of the fund; and it was considered, whether rightly or not is not material, that the whole was executory; but here the legal interest in the property dealt with was vested in one of the parties to the contract; and the contract was entered into with reference to that interest devolving upon the other party; and I can see nothing to make the contract executory. It might, indeed, have been put an end to by a dissolution of the partnership during the joint lives, under the notice provided by the articles, but it subsisted until so determined. A trust certainly cannot be the less capable of being enforced because it is founded on contract.

It was further argued, that there could be no intention in this case to create a trust, because the trust, if created, would interfere with the interim dispositions of the property; but the answer to this argument is, that the trust was to arise at a future time, and to attach upon the property as it should then exist; and I apprehend that it might well be so created.

Some argument was also founded on the reference in the articles to any widow of the testator, and not to his then wife only; but this argument appears to me to be rather against than in favor of the plaintiff, for no widow could take under the testator's will except his then wife; and if she had died, and he had married again, there would have been no provision for the second wife, except by the articles; and it would, therefore, be a reasonable, if not necessary, intention that his design was to provide for her by the articles. I think further, that the relation of the parties and the ordinary habit of providing for members of a family by stipulations in partnership articles, is not to be disregarded in determining this question; and the view which I have taken of it is, I think, much strengthened by considering how it would have stood if the executors of the testator had, upon his death, filed a bill to wind up the concern, or to compel Shattock to give security for the testator's interest, the widow having elected to continue the business. Surely it would have been a sufficient answer on his part to have said, he had stipulated for the testator's capital continuing in the concern if the widow should elect to continue it, and she had made the election.

There remains, then, the question as to the obligation of the widow to elect, and I think she is not bound to do so; for I think that the testator, by the provisions of the articles of partnership, has taken his share of the business wholly out of the provisions of the will. It is true that he had bequeathed his stock in trade, and that the stock in trade at his death, if it had continued to be his, would have passed by the will; but he had alienated it; and I cannot read his will as intended to dispose of that which he had parted with.

In re Mores' Trust.

The decree, therefore, must be, to declare, that, upon the death of the testator, the widow became entitled, under the articles of partnership, to the testator's share and interest in the profits of the business, and also to his share and interest, including excess of capital, if any, of and in the property, stocks, credits, and effects of the partnership, and that the plaintiff did not take and has not any right or interest therein under the will of the said testator; and to direct the usual accounts.

In the Matter of MORES' TRUST.¹

August 7 and November 4, 1851.

Construction — Survivor — "In the event of the Death" — Additional Legacies — Conditions.

By a will property was given to trustees, to apply the rents, interests, and proceeds for the maintenance of the testator's son Edward, for his life, and not to be paid to any person under an assignment by or execution against the son; and after the decease of the son, for the two daughters of the testator, absolutely. By a codicil it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil, the testator gave 600*l.* stock to Edward, in addition to what he had left by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—

Held, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life-interest. That, although in one codicil the words "in the event of the death of Edward," meant upon the death of Edward, it did not follow that the words in another codicil "in the event of both their deaths" meant upon both their deaths; for one expression was applied to a life-interest and the other to a capital sum: That the period of survivorship must be referred to the period of distribution, namely, the death of the testator: That, therefore, Edward, having survived the testator, took the legacy of stock absolutely.

The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given — *quære*.

The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will.

THE testator, by his will, dated the 19th of February, 1829, after bequeathing some leasehold premises to trustees, upon trust to pay

¹ 10 Hare, 171.

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the rents to his daughter, Caroline, for her life, for her separate use; and, after her decease, upon trust for her children who should be living at the time of her death; and, in default of such issue, upon trust for her executors or administrators, devised and bequeathed to the same trustees a freehold messuage at Peckham, and a policy of insurance on his life, upon trust to invest the money to be received upon the policy, and to pay and apply the rents and profits, interest, dividends and proceeds of the freehold messuage, and of one moiety of the moneys to be produced from the policy, to and for the maintenance and support of his son, Edward Rowe Mores, during his life, to be paid to him at such time or times, and in such manner, as the trustees should, from time to time in their discretion think fit, declaring it to be his express will and meaning, that the rents and profits, interest, dividends, and proceeds, so directed to be paid for the support and maintenance of his son, Edward Rowe Mores, should not be paid to any person or persons under any assignment to be made by his said son, or to any assignee or assignees under any Insolvent Act, or commission of bankruptcy, or under any execution or extent which might at any time be issued against him, but that the same should be solely and exclusively for such his support and maintenance; and after the decease of his son, Edward Rowe Mores, he directed the trustees to stand seised and possessed of the freehold messuage and of the moiety of the moneys to be produced from the policy, upon trust for the only use and behoof of his daughters, Elizabeth and Selina, their heirs, executors, administrators, and assigns, for ever. The testator then devised and bequeathed to the same trustees some freeholds or closes of land and some turnpike bonds, and the other moiety of the moneys to arise from the policy upon trusts for the benefit of his son, William George Mores, which were expressed in the same words as the trusts before mentioned in favor of his son, Edward Rowe Mores; and after the decease of his son, William George Mores, he directed these parts of his property also to be held upon trust for the only use and behoof of Elizabeth Mores and Selina Mores, their heirs, executors, administrators, and assigns; and he then gave the residue of his estate, both real and personal, to Elizabeth Mores and Selina Mores, absolutely; and appointed Elizabeth Mores and Robert Willy, his executors.

By a codicil to his will, dated the 6th of May, 1833, the testator, after reciting that he had by his will devised and bequeathed to the trustees the freehold messuage at Peckham and the policy of insurance, upon trust, to pay and apply the rents of the messuage, and the interest of the moneys to arise from the policy, for the maintenance and support of his son, Edward Rowe Mores, for his life, to be paid to him in the manner in his will particularly expressed, declared that in case his said son should assign such rents, profits, or interest, or should become insolvent under any Insolvent Act or commission of bankruptcy, or should any execution or extent be issued against his goods or effects, by any of which means the said rents, profits, or interests should be sought to be obtained for the benefit of any creditor, that then, and in either of the said cases, the trustees should stand seised and possessed of the said messuage and the money to be

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received from the policy of insurance, upon trust for the only use and behoof of Elizabeth Mores and Selina Mores, their heirs, executors, administrators, and assigns, in the same manner and form as declared by his will, in the event of the death of the said Edward Rowe Mores.

The testator made another codicil to his will, dated the 9th of October, 1840, by which he bequeathed to his son, Edward Rowe Mores, in addition to what he had already left him by his will, 600*l.*, 3*l.* per cent. consols, subject also to the same controlling powers, orders, restrictions, and directions of his trustees, as were appointed by his said will; and to his son, William George Mores, subject to the like control, as exercised by his said trustees, in addition to what he had already left him by his will, a further bequest of 600*l.*, 3*l.* per cent. consols, "the same as his brother, and to the survivor of them, and, in the event of both their deaths, to the sole use and behoof of" his daughters, Elizabeth and Selina. Another codicil, dated April, 1842, contained nothing material to the question in the petition. A fourth codicil was dated the 2d of October, 1844, and thereby the testator gave to his son, William George Mores, subject to the like control, order, restrictions, and directions of his trustees, in addition to what he had already left him, his leasehold estate in Park-street, held under Lord Grosvenor, subject to a ground rent of 24*l.* per annum; and in the event of his death, to the sole use and behoof of the daughters, Elizabeth and Selina.

The testator died in April, 1846. Edward Rowe Mores died in March, 1850. And his legacy of 600*l.* consols having been transferred into court, a petition was presented by Elizabeth and Selina, praying that the court would determine on the construction of the codicil of the 9th of October, 1840, and direct the fund, and the dividends accrued upon it since the death of Edward Rowe Mores, to be transferred and paid to the person entitled thereto.

Hallett for the petitioners.

The Solicitor-General and *Willcock* for the other parties.

The following cases were cited, on the construction of the words "in the event of the death of Edward," and "in the event of both their deaths:" *Billings v. Sandom*, 1 Bro. C. C. 393; *Lord Douglas v. Chalmer*, 2 Ves. jun. 501; *Webster v. Hale*, 8 Ves. 410; *Slade v. Milner*, 4 Madd. 144; *Tilson v. Jones*, 1 Russ. & My. 553; *Smart v. Clark*, 3 Russ. 365.

VICE-CHANCELLOR: The question raised by the petition relates to the legacy of 600*l.* consols, in which Edward Rowe Mores was interested; and the points argued were, whether he was absolutely entitled to the legacy of 600*l.* consols; and, if not, whether, upon the death of Edward Rowe Mores, William George Mores took it absolutely; or whether it was to go to him for life only, and, upon his death, to the petitioners, Elizabeth and Selina.

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A suit was instituted by William George Mores, and a mortgagee of his interests under the will and codicils; and by a decree, (see 6 Hare, 125,) he was declared to have been absolutely entitled to the leasehold estate in Park-street. It was, I think, also stated in the argument upon the present petition, that the Vice-Chancellor, Wigram, had, in this suit, also held him to have become absolutely entitled to one of the legacies of 600*l.* consols; but this does not appear by the decree, as stated in the report of the case. *Id.* 136. If it was so held, I presume it was upon the hearing on further directions. The decision, however, whether it may have been, will not relieve me from the necessity of determining the questions raised by this petition. I could regard it only as an authority; but it would, of course, carry with it the great weight to which all the decisions of the Vice-Chancellor, Wigram, are most justly entitled.

In order to arrive at a correct conclusion upon these questions, the case must, I think, be considered, first, upon the terms in which the legacy is given to Edward Rowe Mores; and, secondly, upon the ulterior dispositions which are to be found in the codicil.

The legacy is given to Edward Rowe Mores in addition to what has been already given to him; and it is given subject to the same controlling powers, orders, restrictions, and directions of the trustees as are appointed by the will. Upon the argument of the case, it occurred to me that it might possibly be governed by what is said in *Crowder v. Clowes*, 2 Ves. jun. 449, to have been determined by Lord Thurlow, referring probably to his decision in *Leacroft v. Maynard*, 1 Ves. jun. 279, that added legacies shall be subject to the same conditions as apply to the legacies to which they are added; but, upon further considering the point, I am satisfied that that rule cannot be applied to the present case. It is clear from Sir John Leach's judgment, and from his decision in *Chatteris v. Young*, 6 Madd. 30, (see 2 Russ. 184,) that he did not consider the rule to be universal. There are many cases in which it has not been applied; and I can find no case in which it has been held applicable, except where the original legacy has been absolute or defeasible in the party to whom the additional legacy has been given. To apply the rule in such a case as the present, would be to alter the terms of the disposition, and to convert what is in terms given to Edward Rowe Mores into a gift to him, and, after his death, to his sisters, the petitioners. The rule in question cannot, therefore, be applied in the present case; and I think that the provisions, which subject this legacy to the control of the trustees, mean no more than that they are to be vested with the same discretion, and to be subject to the same restrictions, as to the capital of the legacy, as they already had and were subject to as to the rents and interests given by the will. My opinion, therefore, is, that considering the case only upon the terms in which the legacy is given, Edward Rowe Mores was absolutely entitled to it.

This being the construction of the gift itself, the remaining question is, whether the absolute interest thus given is cut down by the ulterior dispositions. This must depend, first, upon the construction to be given to the words "and to the survivor;" and, secondly, upon

the effect to be attributed to the words "in the event of both their deaths."

With reference to the words "and to the survivors," I think there is no doubt that they apply to this legacy as well as to the legacy given to William George Mores; for they are immediately prefaced and immediately followed by words which apply to both the legatees. The case, therefore, stands thus: the codicil gives 600*l.* consols to Edward Rowe Mores, and 600*l.* consols to William George Mores and to the survivor. It is evident the expression of the codicil is here defective. It is not stated in what event either legacy is given to the survivor. The meaning, I think, must be collected from the context. The succeeding clause provides, that, in the event of the death of both the legatees, both the legacies shall go to the sisters; and I think, therefore, this clause must mean, that, in the event of the death of either of the legatees, both the legacies shall go to the survivor; and thus reading the clause, (and to read it, that, upon the death of either, his legacy shall go to the survivor, would be to convert what is absolutely given, into a mere life-interest,) I think there is no doubt of the construction. The survivorship would be to be referred to the period of distribution, and each legatee surviving the testator would take absolutely.

But then it is said, with reference to the effect to be attributed to the words "in the event of both their deaths," that, although in ordinary cases such words would be held to refer to death in the lifetime of the testator, this testator has put his own construction upon them. That the words "in the event of the death of Edward Rowe Mores," as used by this testator in the first codicil, mean upon the death of Edward Rowe Mores; and that the words "in the event of both their deaths," as used in the second codicil, must have the same meaning. I agree that the words in question, as used in the first codicil, do mean upon the death of Edward Rowe Mores; but I do not think that this warrants the conclusion which is deduced from it, for the words used in the two codicils have reference to different subjects:—in the first codicil, to a mere life-interest; and in the second, to a capital sum; and I do not think that the same words used with reference to different subjects must necessarily receive the same construction. It is to be observed, that, in consequence of the provision of the Wills Act against the lapse of legacies given to children, it was necessary for this testator, if he intended these legacies to go to his daughters, in the event of the death of both his sons in his lifetime, to express that meaning by his will; and I do not know how he could have expressed it in any more appropriate words.

Upon the whole case my opinion is, that Edward Rowe Mores was absolutely entitled to this legacy, and that it belongs to his personal representative, and the order must be accordingly. The costs of all parties must be paid out of the fund.

Cole v. Miles.

COLE v. MILES.¹

July 8, 1852.

Executor — Specific Legatee — Assent — Sale — Assignment — Breach of Trust.

By an assignment, by one of the several executors, of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will, (but not stating the fact that a third executor had also subsequently proved,) and reciting that the executors had assented to the bequest to the assignor, it was witnessed that the assignor, in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The assignor, in his character of executor, was, at the time of the assignment, indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf of the estate of the testatrix, to set aside the assignment, and recover the title deeds, it was

Held, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the court would not disturb the sale.

Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them — *Quere*.

THE testatrix, Lucy Sutherland, was the mortgagee of certain leasehold messuages and plots of land in Market street, Paddington, with a power of sale, to secure 700*l.* and interest. By a third codicil to her will, dated in November, 1843, Lucy Sutherland bequeathed the mortgaged premises to John Townsend, for his own absolute use and benefit; and, by her will, she appointed Cole, Martin, John Townsend, and Chevaux, her executors. The testatrix died in January, 1844. Martin and Townsend proved the will in March, 1844, and Cole in November following. A suit (*Townsend v. Martin*) was instituted in December of the same year, by two of the residuary legatees against the executors; and by the Master's report, made in 1848, it was found, that, on the 30th September, 1845, Townsend was indebted to the estate of the testatrix to the amount of 2,060*l.*; that Townsend was the solicitor of the defendant, James Miles; and that by an assignment, dated the 30th of September, 1845, Townsend assigned to Miles the leasehold premises in Market street, "without ever having obtained any assent whatever on the part of Cole or Martin, his co-executors, to any of the bequests in his favor." That this deed recited the bequest of the premises to Townsend absolutely; the proof of the will by Martin and Townsend in March, 1844; and that the executors of the testatrix had assented to the bequest of the premises to Townsend; and that he had accepted the same, and entered into possession and receipt of the rents and profits thereof; that the

¹ 10 Hare, 179.

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mortgage debt, and an arrear of interest, was unpaid; and that Miles had contracted for the purchase of the premises at the sum of 499*l.*; and it was thereby witnessed, that John Townsend, "in his several capacities of executor and assignee of the said Lucy Sutherland," and in exercise of the power contained in the indenture of mortgage, in consideration of said sum, did bargain, sell, assign, and transfer the said premises unto Miles, his executors, &c., for the residue of the term.

On the 30th of December, 1845, Miles assigned the premises to Cundell, and afterwards Cundell deposited the title deeds with Wilson.

By an order of the 5th of December, 1848, made in *Townsend v. Martin*, John Townsend was ordered, within two months, to pay into court 2,124*l.* 5*s.*; then due from him to the estate of the testator. Under a reference made in the same cause in February, 1849, it was found that the plaintiffs, Cole and Martin, had never assented to any of the bequests to Townsend; and that the assignment by Townsend to Miles was colorable, and without any good and valuable consideration; and that a bill should be filed by Cole and Martin against Townsend, Miles, Cundell, and Wilson, for recovery of the deeds and the possession of the premises, and for an account of the rents subsequent to the 30th of September, 1845. By an order of the 18th of July, 1851, in the cause of *Townsend v. Martin*, liberty was given to Cole and Martin to file the bill accordingly.

The bill, stating the foregoing circumstances, alleged also that the premises were sold by John Townsend, not in his character of executor or trustee, or for the purpose of satisfying claims due from the testatrix or her estate, but on his own account and for his own purposes; and it charged, that Miles had notice that there had been no assent by the plaintiffs to the bequest to Townsend, and that the affairs of the testatrix's estate were wholly unsettled, and that the suit of *Martin v. Townsend* had been registered as a *lis pendens*. John Townsend was out of the jurisdiction, and the *subpoena* was prayed against him when he should return. The bill prayed that the assignments of the 30th of September, 1845, and the 30th of December, 1845, might be declared to be fraudulent and void against the plaintiffs; and that the deeds might be delivered up, and an account taken of the rents and profits received by the defendants.

Miles, by his answer, said that he was informed by Townsend, and believed, that the plaintiffs, Cole and Martin, had assented to the bequest to Townsend, and that the recital of the fact on the deed was true. He admitted that Townsend was his solicitor. He submitted, that it was competent to Townsend, as such executor, to sell the premises, and that his receipt was an effectual discharge; that his assent alone was sufficient; and that an entry into the receipts of the rents and profits, on his own behalf, in the absence of any express assent by the plaintiffs, would be sufficient evidence of such assent.

Cole and Martin were examined as witnesses. Cole stated, that they had given no assent to the bequest to Townsend. The evidence of Martin is stated in the judgment. The payment of the consideration to Townsend by Miles was proved by the defendants.

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K. Parker and *F. T. White*, for the plaintiffs, cited *Morris v. Livie*, 1 Y. & C. C. C. 380; and contended that the statements on the deed with regard to the title and the assent of the executors, were sufficient to put a purchaser upon inquiry, whether the property which was the subject of the assignment was not required for the payment of debts and legacies; and, if any inquiry had been made, the purchaser would have found that Townsend, the executor, was indebted to the estate, and, therefore, not in a position to claim the property for his own benefit. *Jones v. Smith*, 1 Hare, 43; *Taylor v. Hawkins*, 8 Ves. 209. They relied also on the fact, that the principle on which the suit was founded, had received the sanction, and that the suit had been instituted under the direction, of the court; and submitted that the fact of Townsend being the executor of Miles, moreover, gave the latter constructive notice of Townsend's situation in respect of the estate of the testatrix.

Bacon and *W. Morris*, appeared for the defendant, Miles; *Russell* and *E. G. White*, for the defendant, Wilson; and *Willcock* and *Prior*, for the defendant, Cundell; but the arguments on behalf of the defendants were stopped by the court.

THE VICE-CHANCELLOR. There must, I think, have been some evidence before the Master upon the occasion of the inquiry made by him, which is not now before me; for I think that the Master would not, upon the evidence now before me, have come to a conclusion favorable to the institution of this suit.

There is no principle, as it appears to me, more important for this court to observe, than that of abstaining from interference, on any other than substantial grounds, with sales made by executors. If this principle be disregarded, and if sales by executors of the property of their testators be permitted to be disturbed or questioned on slight grounds, it will be impossible to administer any estate except under the direction of this court.

I am much disposed to think that this suit is altogether wrongly framed. Residuary legatees are, no doubt, entitled to follow the property of their testator in the hands of alienees, where the alienation has been made by fraud or collusion between the executors and alienees; but it is one thing for a residuary legatee to follow the property of his testator to the extent to which it has been improperly alienated; and another thing for the coexecutors of an executor alleged to have committed a fraud, in which they have not concurred or acquiesced, to file a bill against such executor, to set aside a sale by him of property of the testator, and to have the title deeds delivered up to the coexecutors. A case against an executor and alienee, such as that which is made by this bill, would, I think, to say the least, have been more properly brought forward by a supplemental bill in the original suit of *Townsend v. Martin*, filed by the plaintiffs in that suit. I do not, however, intend to dispose of this suit on any question of form; and it is unnecessary therefore further to pursue this question.

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The case made by this bill as the ground for setting aside the assignment to Miles of this portion of the estate of the testatrix, is, first, that there was fraud and collusion between the alienees of the estate of Townsend; and, secondly, that, independently of the case of fraud and collusion, the assignment cannot be sustained. There is no evidence to establish the case of fraud or collusion; and the only question therefore is, whether I am to set aside the assignment, and decree the delivery up of the title deeds, on the ground of any facts which I can find on the face of the assignment, or in the situation of the parties with reference to the estate.

The deed recites the mortgage to the testatrix, and her will, by which she bequeathes to Townsend the property comprised in the mortgage; that the will was duly proved by Martin and Townsend on the 9th of March, 1844; that the executors of the testatrix had assented to the bequest to Townsend; and that Townsend had accepted the same, and entered into possession of the premises, and the receipt of the rents and profits thereof. The deed then recites, that the 790*l.*, and an arrear of interest, was due on the mortgage; and that Miles had contracted for the purchase of the premises, at the sum of 499*l.*; and it witnesses, that, in consideration of the said sum, Townsend, in his several capacities of executor and assignee of Lucy Sutherland, and in exercise of the power contained in the mortgage deed, did, for the said consideration, sell and assign the premises to Miles. The deed, therefore, purports to be executed by Townsend in his character of executor as well as of assignee, by virtue of the bequest. Now, if I were to set aside this assignment, I must say that there was no sale to Miles by Townsend in his character of executor; for, if there were a sale by Townsend in that character, it is not even pretended that there is any ground which would warrant me in dealing with it as a sale which is not to be supported. The court does not impose upon parties dealing with executors the duty of ascertaining whether the sale of property vested in the executor in that character is or is not proper. It is said, however, that I ought not to consider the sale as having been made by Townsend in his character of executor, inasmuch as the assignment goes on to state that the executors had assented to the gift, and that Townsend had entered into possession of the property. I am of opinion, however, that I cannot conclude, from this recital, that the sale was not made by Townsend in his character of executor; for, although the assent to the legacy and the possession of the legatee no doubt creates another title, still it is a title which, standing alone, would be open to question upon the fact, whether there had been such an assent by the executors; and where the purchaser takes from the vendor in his character both of executor and legatee, I see no reason why the court should strike out of the operative part of the deed the statement that it is made in his character of executor. The form of the assignment may perhaps be accounted for by the fact that it is not an assignment of the mortgage debt, but of the irredeemable property. Upon the face of the assignment, therefore, I see nothing by which it can be impeached.

It is said, however, that the purchaser had notice of facts which ought to have put him upon inquiry, and which, if he had inquired, would have led him to information that the assignment was not made by Townsend for the benefit of the estate, and that he had not acquired any title by the assent which was untruly alleged to have been given; but the deed recites that the testatrix appointed Cole, Martin, Chevaux, and Townsend, her executors, and that Martin and Townsend only had proved the will, and that the executors had assented to the bequest; which must mean that those executors who had proved the will had so assented. Now, one of the executors, whose assent is thus alleged to have been given, is the party actually making the transfer by the deed; and Martin, the other executor who had proved, has been examined as a witness, and this is the evidence which he gives upon the point:—"I never either assented to or dissented from the bequest of the Market street premises in favor of John Townsend. I understood that he, being of age at the time of the testatrix's death, was entitled to take what she left him without any control of his coexecutors; and I left him to take possession of the interest in the Market street premises bequeathed to him, and to deal with it as he pleased, without interfering with the matter at all either by way of assent or dissent." The testatrix, it appears, died in March, 1844; and the executors left John Townsend in exclusive possession of the property from that time until the sale in the month of September, 1845. He seems to have been all this time dealing with the property as his own; and I think it would be difficult to say, that there was not in fact an assent on the part of the executors; but, at all events, the case on this point is reduced to this—whether a purchaser from an executor and specific legatee of the subject of the specific bequest is bound to inquire whether the other executors have proved the will, or whether they have or have not given their assent. I think it is of great importance that no difficulty should be thrown in the way of the dealing by executors with the property of their testators, and that the purchaser in this case was not bound to make such inquiries. With respect to the purchaser having notice of the original suit, I intimated during the argument, and I continue of that opinion, that it was not material, as the original suit did not relate to the property specifically bequeathed. The bill must be dismissed with costs, to be paid by the plaintiffs; but the plaintiffs, having acted under the order of the court, will repay themselves the costs out of the estate of the testatrix.

Russell v. Jackson.

RUSSELL v. JACKSON.¹

March 6 and 9, 1852.

Secret Trust — Void Devise — Charity — Trustee and Cestuy Trust.

A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—

Held, to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated.

Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially.

In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to show to what part of the property the trust does not extend.

THE suit of one of the next of kin of the testator in the cause, alleging that the gift in his will to William Jackson and Thomas Aston Jackson was made upon a secret and illegal trust, and that it was therefore void. The heir at law, who was also stated to be the other next of kin, and the Attorney-General, as representing the crown, were made defendants.

The facts of the case, and the evidence on which the court proceeded, appear fully in the judgment.²

¹ 10 Hare, 204.

² The will was as follows:—

"I, Joseph Russell, of &c., do make and publish this my last will and testament in manner following, that is to say—First, I direct that all my just debts, funeral and testamentary charges and expenses, be fully paid and satisfied by the executors hereinafter named. I give, devise, and bequeathe all my freehold messuages, land, and hereditaments, situate at Shirley street aforesaid, unto my brother William Russell, to hold to my said brother for the term of his natural life; and from and after his decease, I give, devise, and bequeathe the same to William Jackson and Thomas Aston Jackson, their heirs and assigns for ever. I also give, devise, and bequeathe unto the said William Jackson and Thomas Aston Jackson all the rest and residue of my freehold and leasehold property, stock-in-trade, household furniture, and effects, whatsoever and wheresoever, and of whatsoever nature or kind, of which I may die possessed: To hold the same unto the said William Jackson and Thomas Aston Jackson, their heirs, executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter mentioned and declared respecting the same; (that is to say) upon trust that they the said William Jackson and Thomas Aston Jackson, or the survivor of them, his executors or administrators, do and shall, as soon as conveniently may be after my decease, collect and get in my debts, and sell and dispose of all my freehold (except the Shirley street property hereinbefore disposed of) and leasehold property, stock-in-trade, household goods, and other effects, either by public auction or private contract [their receipt to be discharges]. And I do hereby further will and direct, that the

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Speed, for the plaintiffs, submitted, first, that upon the evidence in the cause it was clear that there had been an express or a tacit undertaking on the part of the devisee and executors to perform the directions of the testator as to founding a school, and that this created a trust, upon which the court would act, and prevent the devisee and executors from holding the estate discharged of the trust. *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennigate*, Amb. 67; *Barrow v. Greenough*, 3 Ves. 152; *Oldham v. Litchford*, 2 Vern. 506; *Podmore v. Gunning*, 7 Sim. 644; s. c. 5 Sim. 485; *Walker v. Walker*, per Lord Hardwicke, 2 Atk. 99; *Muckleston v. Brown*, per Lord Eldon, 6 Ves. 69. There being evidence of a trust, the question is, whether the trust is void wholly or to any extent; for, to the extent to which it is void, as to the personal estate, the next of kin are entitled. *West v. Shuttleworth*, 2 My. & K. 684; *Boston v. Statham*, 1 Eden 508; *Edwards v. Pike*, Id. 267; and the disposition is void against all parties, and not only against those by whose act it has been obtained. *Huguenin v. Baseley*, 14 Ves. 289. The trust in this case is shown to be for purposes inimical to the Christian religion, and therefore void. A gift in aid of contributions "towards the political restoration of the Jews to Jerusalem and to their own land" has been held void. *Hebershon v. Vardon*.¹

Walker and Kirkman for the heir at law of the testator.

W. P. Wood and W. M. James for the Attorney-General.

Rolt and F. T. White for the defendants, the Jacksons, contended that there was nothing to affect them with any trust. *Burney v. Macdonald*, 15 Sim. 6. They submitted, that there was a total absence of proof either as to what the purpose was which it was suggested the testator had in his mind, or that he continued to entertain the intention when the difficulties in effecting it had been pointed out to him, or even as to what portion of his property he had at any time intended to dedicate to the suggested purpose; and they contended that it was contrary to the principles of the court to declare the existence of a trust entirely uncertain as to the subject or object. If, however, there were to any extent a trust, there was no reason why it should not be carried into effect, so far as it was lawful; and the trust gave the next of kin no right to sue. The affairs of a com-

said William Jackson and Thomas Aston Jackson shall receive the money to arise from such sale and collection, and stand and be possessed thereof in trust to pay and discharge the legacies hereinafter by me given and bequeathed (that is to say) [here followed some legacies to persons named]. I direct the before-mentioned legacies to be paid to the respective legatees within six months after my decease. And as to all the rest and residue of the moneys to arise from the before directed sale and collection, I give and bequeath the same unto the said William Jackson and Thomas Aston Jackson as a testimony of my regard and esteem for them, and as a compensation for the trouble they will have in the execution of this my will; and I appoint the said William Jackson and Thomas Aston Jackson executors of this my will and testament."

¹ Before Sir James Knight Bruce, V. C., 30th May, 1851.

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pany for establishing a school on the principles of Robert Owen had been the subject of a suit in this court, without any objection as to its legality. *Jones v. Morgan*.¹

VICE-CHANCELLOR. This is a bill filed by Samuel Russell as one of the next of kin of the testator, Joseph Russell, suggesting that Joseph Russell has disposed of the residue of his real and personal estate to the defendants, William Jackson and Thomas Aston Jackson, upon a secret trust, either for charitable or for illegal purposes; and the bill seeks to have it declared that the residuary devise in the will to these defendants was made to them upon a secret trust, to establish schools for promoting doctrines of Socialism, as taught by Mr. Robert Owen; and that the said defendants are trustees of the residue for the heir at law and next of kin, or representatives of the next of kin of the testator.

The first question which arises is, was there, or was there not a gift by this testator to these defendants, upon a trust, either for charitable or for illegal purposes. The answer to that question must be gathered from the evidence which has been given in the cause; and upon that subject we have the evidence of Mr. Bray, the solicitor, by whom this will was prepared; and he states, in his first examination, in answer to the 13th interrogatory, that the testator, Joseph Russell, devised and bequeathed his residuary estate to the defendants, William Jackson and Thomas Aston Jackson, intending them to hold it on a secret trust. When this witness was first examined he demurred to the questions relating to the trust. That demurrer was overruled by the court. He was examined a second time; and at the hearing of the cause an objection was taken to the admissibility of his evidence on a motion to suppress the deposition; I, however, thought the evidence was admissible, (see 9 Hare, 387); and, therefore, it is necessary to see what he says on the subject of the secret trust in his further deposition.

In his further deposition Mr. Bray says, in answer to the 13th interrogatory, the secret trust inquired of was that stated in my answer to the 6th interrogatory; and in his answer to the 6th interrogatory, he says:—"The general purport and effect of the instructions which I received for the preparation of the will of the testator, Joseph Russell, were declaratory of his intention to leave his property for the purpose of establishing a school for the education of children in the doctrines of Socialism, and, so far as I recollect, according to the principles of Robert Owen. I do not recollect whether those written instructions contained the names of persons to whom the testator intended to leave legacies, or the amount of such legacies; but my attention was principally directed to the peculiar intention of the testator as to the disposition of his property for the purpose aforesaid. I cannot recollect whether the instructions mentioned any real estate or residue of his property; but my impression is, that the instructions were, gene-

¹ 14th January, 1846, before the Vice-Chancellor of England. See 10 Jur. 238.

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rally, to leave his property as I have before stated. I well recollect that the instructions contained the scheme on which the testator intended that the proposed school should be conducted." We have, therefore, the evidence of Mr. Bray establishing directly the fact that the gift was on a secret trust, and that that secret trust declared the intention of the testator "to leave his property for the purpose of establishing a school for the education of children in the doctrines of Socialism."

In addition to the evidence which is given by Mr. Bray on that subject, we have also proof of the statement made by this testator before his death, that he could not give or make dispositions in favor of other persons who applied to him to leave legacies, because he had left his property for the purpose of founding a school. We have also evidence of conversations between one of the defendants and different persons, from which it appears there is something very nearly approaching to (I do not say actually amounting to, but approaching to) an admission on his part, that the property was given to the defendants on trusts; and, on this state of the evidence, without an attempt on the part of the defendants to disprove the case by cross-examining Mr. Bray on that subject, and without any further evidence given by them than that they were members, and that the testator was, as they say, a member of the Church of England, I think I should not be justified in holding that there is not proof of an intention on the part of the testator to give this property to the defendants upon a trust for the purposes of founding a Socialist school.

It was argued that it was unnecessary, or might be unnecessary, to go further into the case; because, if it appeared that the testator's intention was to give the property upon a secret trust for charitable purposes, whether the intention was communicated to the devisees or not, the law would not allow that intention to take effect. I do not think it necessary, nor would it be wise in me, to give any opinion on that point. In the present case, I think it is clearly proved, that, whatever were the intentions of this testator, they were communicated to these devisees. I think it appears sufficiently established by the evidence, that the original instructions for this will, drawn up by the testator, and stated by Mr. Bray to have contained the scheme for founding this school, were taken by William Jackson, one of the defendants, and delivered to Mr. Bray, the solicitor by whom the will was prepared. Whether William Jackson, at the time, knew the contents of those instructions or not, is not in proof; but there is in proof, that, in the course of the conversation which took place between Mr. Bray and William Jackson on that occasion, Mr. Bray stated his doubts whether the intentions which were expressed by the testator in the instructions could legally be carried into effect. That led to an interview between Mr. Bray and the testator, and, certainly, William Jackson; and I think, upon the evidence, I am justified in saying that Thomas Aston Jackson was present at that interview, though I do not think it material to consider whether he was there or not. The result of the evidence as to what passed at the interview is, that the doubts which Mr. Bray had before expressed to William

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Jackson, as to the power of the testator to make the disposition he intended in favor of the charity, were repeated by him in the presence of the testator; and what then passed is to be found in the answer of Mr. Bray to the eighth interrogatory, where he says:—"When I accompanied William Jackson to the house of the testator, on the 7th of July, 1840, as stated in my former examination, I referred to the written instructions I had received from him; and stated, as I had done to the defendant, William Jackson, my doubts as to the legality of his intended disposition of his property for a school for the purposes set forth in these instructions. To the best of my recollection, the defendants, William Jackson and Thomas Aston Jackson were both present; and the testator then stated, that, having confidence in the two defendants, he would leave his property to them, being satisfied that they would carry out his intentions, which they well knew, and the defendant, William Jackson, assented to this; but whether Thomas Aston Jackson expressed his assent I do not recollect, but if he was present he did not dissent."

What, then, must be considered on this evidence really to have passed at this interview? The testator says, I wish to give my property for the purpose of founding a Socialist school. Mr. Bray says, that is an intention which, by law, you cannot carry into effect. The testator then says, "I will leave the property to the two Jacksons: they know my wishes, and I am satisfied they will carry out my intentions." Does not that amount to an undertaking,—a promise on their part, to carry out the intentions which the testator had expressed in the will? The true test of the answer to the question is this, would the testator have left his property to the defendants, if the defendants had stated in answer to that question that they would not carry out the disposition which the testator intended to effect through the medium of the trust, which he had declared on the instructions. No one can doubt, that, if these defendants had stated that they would not carry out the intentions of this testator, this disposition in their favor would not have been found in this will. Then, if the disposition in their favor is made, and made only for the purpose of carrying out the testator's intentions, and made upon their assent, and undertaking that those intentions shall be carried out, surely it must be considered as an undertaking by a devisee that he will carry out the intentions of his testator. Suppose a case which is more familiar and common, and shows the foundation of the rule: The case of a devise to A, and the testator saying, I mean to charge that estate with a legacy of 500*l.* in favor of B, and then the devisee saying, if you do not create the charge I myself will pay the legacy to B. What is the law on the subject? It is perfectly clear, that, in that case, the devisee would be bound to pay the legacy, through the equity which would attach on him in this court. So, I think, in the present case, the assent on the part of William Jackson to this devise fixed on him a trust which this court would not permit to be defeated by the subsequent act. I think, upon the evidence, I am justified in saying that Thomas Aston Jackson was present on this occasion and did not dissent. I think the true result of the evidence is, that he was pre-

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sent at the interview; though I might not be justified in saying he was present at the time when the assent was given by William Jackson. But, whether Thomas Aston Jackson was present or not, the evidence is, I think, clear that the gift would not have been made to him but for the promise given by William Jackson, that the intentions of the testator should be carried into effect: and I fully agree to the principles laid down in *Huguenin v. Baseley*, 14 Ves. 289, followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it.

I am of opinion, therefore, on the facts of this case, that it is proved there was a devise of the residuary estate of this testator to these defendants on a secret trust.

The case was, however, argued in this point of view:—It was said, that, although there was a trust, the trust was not definite; that, in order to create a trust, you must find a certainty of subject and of object; and that there was here no certainty of one or the other; and cases of precatory trusts were referred to, rather than cited, in support of that view of the case. I think cases of this description are entirely distinguishable from cases of precatory trusts. In cases of precatory trusts, where a man gives a certain sum to A, hoping or believing or confiding that A will make some disposition in favor of B, the certainty or uncertainty of the disposition intended by the testator in favor of B affords a criterion of whether it was the intention of the testator or not to bind A by the trust; because, if it be uncertain what amount was to be given to B, it would be in the power of A to cut down B to nothing, and therefore the testator has expressed no definite intention in favor of B; and thus the uncertainty of the subject and of the object in those cases determines, or has gone far to determine, the question, whether the intention of the testator was to create a trust or not. But, in the present case, there is no doubt of that intention. Here there is the absolute undertaking given by the devisee to apply the money to a particular design and purpose indicated by the testator; and this case, therefore, seems to me to fall rather within the principle of another class of cases than within that of precatory trusts: I mean that class of cases which says, that, if there be fraud, it lies on the party who has been guilty of the fraud to sever the deposition which is affected by the fraud from that which is not affected by the fraud. As for instance, in the case of a trustee, who has mixed up moneys belonging to his trust with moneys of his own, the *onus* is on him to distinguish that part which is affected by the trust from the part which is not affected by the trust; and if he fails in making that distinction, to the extent he so fails the court holds the property to be bound by the trust: and so in the present case, I am disposed to think the effect of there being any uncertainty (if there be any) as to the portion of the property which was intended to be bound by this trust, would be to throw on the defendants the *onus* of distinguishing that which was to be bound by the trust from that which is alleged to be unaffected by it. On this part of the case, I am of opinion that there is a trust sufficiently proved.

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With respect to the object of the trust, I think it is proved sufficiently, that the trust attempted to be created was either illegal or charitable. But, supposing it is not proved that the trust was illegal or charitable, still it is clear that the devise was made to these defendants, for the purpose of holding it upon trust; and, being held by them on trust, the result, as I conceive, is, that they cannot take beneficially in any view of the case.

I am of opinion, therefore, that there must be a declaration, that, it appearing by the evidence that the residuary property was given to these defendants upon trusts, which, as to the moneys arising from the sale of the freehold and leasehold estates, could not by law take effect, those dispositions, so far as they relate to the respective moneys to arise from the sale of the freehold and leasehold estates, are void; and that the defendants, the Jacksons, are trustees for the heir at law and next of kin of the testator in respect of moneys arising from those dispositions.

There remains then a question arising between the next of kin and the Attorney-General as to the pure personalty. Now, on looking at the evidence, I am not quite satisfied on the question which has been raised of the nature of the doctrines of socialism. What is said on that subject is this, that the leading principle of the society or sect is, "to establish a new system, called the rational system of society, derived solely from nature and experience, and ultimately to terminate all existing religions, governments, laws, and institutions." Now those are stated to be the doctrine of socialism as propounded by Robert Owen; but whether this testator was clearly referring to the doctrines of socialism as propounded by Robert Owen, or not, rests, I think, on rather loose evidence; for all the evidence that I have been able to find on the point is, that Mr. Bray says, "that the instructions which he received from the testator were declaratory of his intention of establishing a school for the education of children in the doctrines of socialism, and, so far as I recollect, according to the principles of Robert Owen." Whether there be any doctrines of socialism other than the doctrines of socialism founded by Robert Owen, and what such other doctrines of socialism are, I do not know. At all events, there is a sufficient case for inquiry on this point; and I think, moreover, that the case is a proper one on which to direct the inquiry, inasmuch as the matter is not in issue between the Attorney-General and the plaintiff, and therefore there is nothing in truth on which I could adjudicate as between them on the question whether the property is given on an illegal or on a charitable trust.

The will contains no trust for the payment of debts. The words are: "all the rest and residue of my freehold and leasehold property, stock in trade, household furniture and effects, whatsoever and where-soever," upon trust to sell, and receive the money to arise from such sale, "and stand and be possessed thereof, in trust to pay and discharge the legacies hereinafter by me given and bequeathed." The debts therefore will not fall on the freehold estate. The declaration will be, that the funeral and testamentary expenses and debts be paid *pro rata* out of the pure personal estate and personalty affected with

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land, and that the legacies be paid *pro rata* out of the freehold, leasehold, and personal estate. It must be referred to the Master to take an account of the freehold, leasehold, and personal estate, distinguishing all parts of the personal estate which by law could not be given for charitable purposes; and then to take also the usual account of the testator's funeral and testamentary expenses and debts. The Master will take an account of the rents and profits which have been received, and inquire what would be the proper proportion of the debts and of the legacies to be paid out of the three several properties according to those declarations. And he will also inquire what are the doctrines of socialism referred to by the testator. And further directions and costs will be reserved.

*Ex parte MANICO; in re MANICO, a Bankrupt.*¹

January 26, 1853.

Bankrupt — Certificate — Pledging — Construction of the 256th Section of the Bankrupt Law Consolidation Act, 1849.

Where the usual course of dealing carried on by the bankrupt, who had traded without capital, had been to purchase goods, and immediately afterwards to raise money by pledging them, and it appeared that this was done, not for a purpose merely dishonest, but in accordance with the custom in his trade, and with the *bona fide* expectation of being able afterwards, on a rise in the market price of the goods, to redeem the goods and sell them at a profit, it was held that this was not equivalent to the offence of contracting debts "by any manner of fraud, or by means of false pretences," within the meaning of the 256th section of the Bankrupt Law Consolidation Act, 1849.

The 256th section of the statute is to receive a strict, rather than a loose construction, as against the bankrupt; and

Semble, that where one only of the offences enumerated in the 256th section has been committed, it is not imperative upon the court to inflict the full penalty specified in the statute; but that it has a discretion, upon the circumstances, to award a minor degree of punishment.

THIS was an appeal by the bankrupt from the decision of the commissioner, refusing him altogether both his certificate and personal protection. It appeared, that in 1846 the bankrupt, being then of the age of twenty-three years, commenced business as a retail wine merchant, with a capital of 1,000*l.*, which had been lent to him for the purpose by a friend. This retail business he carried on until August, 1849, when he disposed of the good will thereof to a Mr. Richard Carter, and then commenced trading as a wholesale wine and spirit merchant. This trade consisted in purchasing upon credit considerable quantities of wine while in bond, and selling the same either to retail dealers or private purchasers. The wines thus purchased by the bankrupt were, while in his possession, represented by warrants

¹ 17 Jur. 359.

Ex parte Manico ; In re Manico.

or delivery orders given to him by the sellers ; and it appeared that the bankrupt, who was without capital, had been in the habit of pledging these warrants for the purpose of raising funds to carry on his business. It appeared also that the lenders, upon the security of the warrants, who had always a power to sell on default of redemption, had in many instances been left to sell the wines at a great sacrifice, frequently at prices 50*l.* per cent. below the cost price ; and that on many occasions the bankrupt had himself sold the wines at a great loss almost immediately after having purchased them. The evidence showed, that by these means the bankrupt, from being unembarrassed in August, 1849, when he gave up his retail wine business, had become indebted to the extent of 18,000*l.* at the time of the adjudication in June, 1852. At that time the assets were only sufficient in amount to pay a dividend of 1*s.* 3*d.* in the pound ; and it appeared from the bankrupt's books, that so lately as December, 1851, the assets, if then realized, would have produced a dividend of 10*s.* in the pound upon the debts then owing. It was deposed by the bankrupt, that it was the custom in the wine trade for the owners of wine in bond to obtain loans or advances of money upon such wines by depositing the warrants with the lenders, and authorizing them to sell the wines on failure of redemption of the warrants ; and that, without obtaining such advances, it would be impossible to carry on such trade without a very considerable capital. He deposed also that the advances made to him were mostly made, according to the custom of the trade, for two or three months, the bankrupt at the time always expecting to be able, before the expiration of the loan, to realize the wine at a profit. In this expectation he had been deceived, and, either from the state of the market, or a mistake in his estimate of the value of the wines, was, in the great majority of instances, obliged to allow the wines to be sold at a ruinous sacrifice. It appeared also that the books of the bankrupt had been regularly kept, though not always balanced ; that since the bankruptcy he had afforded every information to the assignees in the investigation of his affairs ; and, lastly, that he had throughout the period of his wholesale business been economical in his private expenses.

Bacon, Q. C., and *Baggallay*, for the bankrupt, in support of the appeal, admitted that the conduct of the bankrupt, and the course of trade pursued by him, was in the highest degree blamable ; but they contended that he had committed no offence within the 256th section of the Bankrupt Law Consolidation Act, 1849, which bound the commissioner altogether to refuse both his certificate and protection. They submitted that, considering the youth of the bankrupt, his entire inexperience, and the reckless way in which he had been trusted, a much less severe sentence than that which had been pronounced by the commissioner would be sufficient to meet the justice of the case.

Swanston, Q. C., and *Bagley*, for the assignees, *contra*, contended, that there had not only been gross imprudence on the part of the

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bankrupt, but reckless gambling, amounting to absolute fraud ; and that the transactions upon the warrants amounted to a contracting of debts by fraud and false pretences, within the meaning of the third division of the 256th section of the Bankrupt Law Consolidation Act. That being so, the commissioner, they submitted, was bound to act as he had done. They cited *Ex parte Holthouse*, 1 De G. Mac. & G. 237 ; s. c. 8 Eng. Rep. 277.

Baggallay replied.

KNIGHT BRUCE, L. J. The conduct of the bankrupt is with great propriety admitted to have been in several respects blamable ; the conduct of the petitioner as a trader, I mean. The case, however, to say nothing of the great difference which appears to have existed in point of age between *Holthouse* and the petitioner, is not one which deserves to be visited to the same extent as in the case of *Holthouse* — a case in the decision of which I concurred, and which I still think rightly decided. The question has been raised, whether, in this case, we are to apply the 256th section of the Bankrupt Law Consolidation Act, as to which, recollecting that it contains the word “offences,” and that there is absent from the act, whether intentionally or not, the provision to be found in former acts, that it is to be construed beneficially for the creditors, I am of opinion that it is to receive rather a strict than a loose construction. I am of opinion, that though there may have been, and probably was, some degree of impropriety in the conduct of the bankrupt with respect to one, perhaps more, of his debts, there has not been proved a contracting of debts by any manner of fraud or false pretence, within the meaning of the 256th section ; and I believe there is no suggestion of any other conduct as bringing him within that section. The consequence is, that the case falls within the general discretion, to be judicially exercised, given by the act of parliament. The case was this :— The bankrupt, a very young man, commenced business as a wine merchant without capital, and probably known by the creditors to be without capital, and not brought up, and probably known by the creditors not to have been brought up, to the business of a wine merchant. He acted carelessly, imprudently, and rashly in several instances. In many instances he sold goods immediately after having purchased them, and in others, very soon after buying certain goods, he pledged them. I am not satisfied, however, from the evidence, that we have any right to attribute to him the intention of buying goods with the mere view or for the mere purpose of pledging them, or for any mere dishonest purpose. His books have been kept regularly, and I am not aware of any instance of untruth on his part. To this I may add, that, being a married man with two children, his expenses throughout the whole period under consideration have been kept within the bounds of moderation and economy. No instance has been shown of vanity, ostentation, or self-indulgence in his conduct. Taking all these circumstances into consideration, my impression is, exercising, as I am bound to do, my best judgment—

Ex parte Manico; In re Manico.

my impression, I say, speaking with great deference to the learned commissioner before whom the case has been, is, that a milder decision would satisfy the demands of justice, both in the particular case, and on the general ground of the interest of society, the consideration of which is not to be omitted from view in questions of this description. Taking all the circumstances of the case together, I am disposed to say, and in that I believe I have the concurrence of my learned brother, that the demands of justice will be satisfied by suspending the bankrupt's certificate for two years from the 14th of June last, the date of the petition of adjudication, and when granted, that it should be of the third class; and that the bankrupt be deprived of protection for two months from this date, but not afterwards.

TURNER, L. J. I concur in the construction put upon the statute by my learned brother. The statute has, in certain cases, rendered it obligatory upon the court either to refuse or suspend the certificate of a bankrupt for certain offences enumerated in the 256th section. This case, however, does not, in my opinion, fall within the range of that section. Had it done so, I should, I confess, still have entertained a doubt whether the punishment awarded by the learned commissioner against the bankrupt has not gone too far; for, if the court, in cases of this description, where one only of the offences enumerated has been committed, is bound to inflict the extreme penalty, I know not what is to be done where every one of the offences has been committed. I think the legislature intended to entrust the court with a discretion to see which and how many of the offences have been committed, and what mitigating circumstances there are to induce it to diminish the punishment which the statute has awarded. Now, in the circumstances of this case beyond all doubt, one is bound to say that the conduct of the bankrupt has been blamable in the highest degree. No man can justify the conduct of a trader who buys goods and pledges them the next day to raise money to carry on his business; but, on the other hand, on examination of the course of these transactions of the bankrupt, I find that the pressure upon the bankrupt seems to have commenced in April, 1852, and that the transactions complained of were not resorted to, to a great extent, till April, 1852; that his books have been regularly kept, though it is admitted he did not balance them regularly; that his private expenses did not exceed 250*l.* a year; and I find it stated in his affidavit, and not denied by the respondents, that in the course of these transactions he has not been seeking to purchase goods from his creditors for the purpose of raising money by pledging them, but that the creditors, as they are far too much in the habit of doing, have pressed on the bankrupt the purchase of their goods. All these circumstances would deserve consideration even if the case were within the 256th section of the statute. In my opinion it does not fall within that section; and, under the 198th section, I am bound to give due consideration to the conduct of the bankrupt previous to the bankruptcy. Having regard to all the circumstances I have mentioned, I think the punishment awarded by my learned brother is adapted to meet the justice of the case.

In re Domville's Trusts.

In re DOMVILLE'S TRUSTS.¹

March 15, 1853.

Will—Construction—Gift Over.

A testator gave the income of a fund to trustees, in trust to pay the same to A. B. for life, and after her decease to pay the principal money to her daughters, C. and D., in equal shares; with a gift over to the issue of either of them dying in the lifetime of A. B.; and should either C. or D. die in the lifetime of A. B., without leaving issue, then the whole fund was to go over to the survivor of the two daughters; but in case both of them should die in the lifetime of A. B. without leaving issue, then in trust for W. W. absolutely. The testator died in 1844, leaving A. B. and her daughter D. surviving. C., the other daughter, died in his lifetime, unmarried:—

Held, that, upon the death of A. B. the surviving daughter was entitled to the whole fund.

RICHARD GANDY DOMVILLE, by his will, dated the 22d June, 1843, gave, devised, and bequeathed all his real and personal estate to certain trustees, upon trust to sell and dispose of the same, and to invest the proceeds thereof; and, as to one third part of the proceeds of such real and personal estate, to pay the income of such investment to Alice Woodall, for life; and after her decease, in trust to pay the principal money to her daughters, Ellen and Martha, share and share alike, and to the issue of such of them as should be dead, at the decease of Alice Woodall, leaving issue, equally, share and share alike; such issue, nevertheless, to have and take the part or share only which his, her, or their parent or parents would, if living, have taken; and in case either of them, Ellen or Martha, should die in their mother's lifetime without leaving issue, then in trust for the survivor of them, the said Ellen and Martha; and in case both of them should die in their mother's lifetime, without leaving issue, then in trust for William Woodall absolutely. The testator died on the 24th June, 1844, leaving Alice Woodall and her daughter Martha him surviving. Ellen, the other daughter, died unmarried in the testator's lifetime. Alice Woodall, the mother, having died, her surviving daughter Martha claimed to be entitled to the share which her deceased sister Ellen would have been entitled to had she lived. The trustees had paid the share of the deceased daughter Ellen into court, under the Trustees Relief Act, and Martha Woodall now petitioned for payment of the fund in court to her as the party entitled under the will. The trustees only had been served with a copy of the petition.

Horsley, for the petitioner, brought on the petition, as being unopposed.

[ROMILLY, M. R. Supposing Martha Woodall not to be entitled to the share of the fund, who is?]

¹ 17 Jur. 361.

In re Clarke.

Probably your Honor will consider that the next of kin of the testator are entitled.

Hemings, for the trustees, did not oppose.

ROMILLY, M. R. Unless the counsel for the trustees argue the case on their behalf, I must require that the next of kin be served with notice of this petition. I will not take it as unopposed, but it may keep its place in the paper.

Horsley, later in the day, brought on the petition, and contended that Martha Woodall, the surviving daughter, was entitled to the whole fund. He cited *Humphreys v. Howes*, 1 Russ. & M. 639.

Hemings, contra, argued that the general principle was, that a legatee must survive the testator in order to acquire any share which might be the subject of a gift over; and he referred in support of the proposition to *Rider v. Wager*, 2 P. Wms. 331, and *Smith v. Oliver*, 13 Jur. 159.

ROMILLY, M. R. The rule established by several cases is, that a gift to a class can only be taken by those who survive the testator, but that when gifts are to individuals named, with a bequest over, on the death of any of them, the survivors will take the share of any who died in the testator's lifetime, to prevent any intestacy. The petitioner, Martha Woodall, is entitled to Ellen's share, after paying the costs of the trustees, as between solicitor and client, out of the fund.

*In re CLARKE.*¹

February 18, 1852.

Infant — Advancement — Emigration.

Part of the principal in court, to which infants were entitled, advanced towards enabling the infants to emigrate with their guardian.

In this case the infant petitioner, Mary Clarke Bailey, of the age of eighteen years, was entitled to 1,000*l.*, and the infant petitioner, Thomas Bailey, was entitled to 500*l.*, which two sums had been paid into court, and invested under the Trustee Relief Act, and the dividends thereon had been directed to be paid to William Bailey, the

¹ 17 Jur. 362.

In re Clarke.

only brother of the petitioners, as their guardian, for their maintenance. The petitioners had no other relation than William Bailey, and he was about to emigrate to Australia, and to establish himself as a sheep farmer there, in which occupation he had had previous experience. He now proposed to take the petitioners with him ; and the petition prayed that the sum of 200*l*., part of the sum in court, should be paid to William Bailey, he undertaking to apply it for the outfit and passage-money of the petitioners. The total outfit would amount to 300*l*., but William Bailey was willing to advance the surplus, and to give up the dividends for the future. Affidavits verifying the statements in the petition, and stating that William Bailey was likely to succeed in Australia, were filed in the matter.

Southgate, for the petitioners.

KINDERSELEY V. C., made the order accordingly.

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How Proved.] Affidavits properly sworn in a Colony, before the Chancery Amendment Act came into operation, are within the 22d section of that act; and it is unnecessary to prove the signature of the commissioner of affidavits to make them evidence. *Bateman v. Cooke*, 92.

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ANNUITY.

1. *Perpetual or for Life.*] A testator, having some real property, and considerable sums invested in foreign funds, after having by his will given various pecuniary legacies, said, "I desire that my executors shall purchase annuities for each of my two sisters, E. B. and H. F., of 100*l.* a year each, the said annuities to be purchased in the British funds." He then gave other annuities, and proceeded — "I direct my landed property at O. to be sold by auction, and the produce to go to the carrying out

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of the aforesaid annuities and legacies; and should the produce of the said sale not be found sufficient for that purpose, I desire that the remainder shall be made up from my personal property. After the above annuities and all legacies have been paid and effected, I desire the remainder of my personal property shall be laid out in the purchase of an annual income in the 3L per cent. consols, for the benefit of a cancer ward in the Middlesex Hospital":—

Held, (dissentiente Lord CRANWORTH, L. J.,) reversing the decision of the Master of the Rolls, that the annuities given to E. B. and H. F. were not for life only, but perpetual. *Kerr v. Middlesex Hospital*, 66.

2. *British Funds.*] *Quære*, what is the meaning of "British funds," as occurring in this will. *Ib.*

3. *Absolute Interest.*] Per the Lord Chancellor. Where, in these cases, the will is fairly open to the construction that the absolute interest passes, the authority of parliament in favor of general devises of land ought to have some influence. *Ib.*

4. *Purchase of—Undue Influence.*] An assurance company, through B., the medical attendant of a married woman, who was also the trustee of the deed made upon her separation from her husband, purchased of her, with a knowledge of these facts, four annuities: each of these was secured by B.'s warrant of attorney, and also by her conveying to trustees for the company the rents of certain real estates settled to her separate use. B. received, if not the whole, certainly very large benefits from the transactions:—

Held, that these purchases were valid; that she had competent advice; that the transaction was fully explained to her; that she knew it was a purchase for value, and that the rents of her estate were made liable for the payment, and that she was not subject to coercion or undue influence, and that the rents of the settled estates were applicable to the payment of the annuities. *Blaitie v. Clark*, 371.

5. *Rectifying Settlement.*] *Held*, also, that the court in its discretion, under the 53 Geo. 3, c. 141, s. 6, could direct allowance to be made to her in account for sums deducted from the purchase-money for the last two annuities for insuring the life of B., the medical attendant, and for compound interest upon the arrears of the previous annuities, and that such deduction did not invalidate either of the two last transactions. *Ib.*

6. *Duress.*] A marriage with a ward of court, a tenant in tail of real estates, took place without consent; proposals were made under various orders of the court, that the personal and real estate of its ward should be settled, and that the income should be secured for the separate use of the wife. A deed of covenant was afterwards executed by the husband, and the income of the personal and real estates was to be paid to the wife for life for her separate use, with a provision against anticipation as to the personal estate, which was omitted as to the rents of the real estate. The deeds executed to bar the entail and resettle the estates, according to the proposals, were informal, and the wife alleged that she executed them under duress, and for fear of an attachment. The wife separated from her husband and charged the rents of the estate with the payment of several annuities, after which the husband died. Upon a bill by the wife to rectify the settlement and obtain payment of the rents:—

Held, that the wife having dealt with the property upon the footing of the settlement was so far bound; and that, assuming there was a mistake, the court would not assist her to defeat transactions *bonâ fide* entered into with third parties on the faith of the settlement being correct; and the cross bill was dismissed, but without costs. *Ib.*

Interest on.]

See INTEREST.

When Subject to a Legacy Duty.]

See LEGACY DUTY. WILL.

APPOINTMENT.

Power of.]

See POWER.

Chancery.

AUCTION.

See VENDOR AND PURCHASER.

BANK.

Shareholder — Rights of Creditors.] R. S., a shareholder in a joint-stock banking company, sold his shares, and gave notice of it to the company; and upon an application by the purchaser, he received a certificate with the signature of three directors that his name had been entered on the share register list. Under the Joint-Stock Companies Banking Act, 7 Geo. 4, c. 46, s. 8, the company made a return to the Stamp Office stating that R. S., the vendor, had ceased to be a shareholder. The bank subsequently suspended payment, and upon a call being made, the purchaser of the shares neglected to pay it, in consequence of inability. The bank then made an entry in the share register list, stating that the transfer was invalid for want of the consent of a board of directors duly constituted, and they made a fresh return to the Stamp Office, in which they inserted the name of R. S. as a shareholder. A writ of *scire facias*, at the instance of the bank, was then issued by a creditor of the company against R. S., upon a judgment obtained against the company, and a verdict was obtained against R. S. on the ground that the transfers were invalid for want of strict compliance with the company's deed:—

Held, upon a bill filed by R. S., that he was not bound to inquire whether the provisions of the deed had been observed, and that he had ceased to be a shareholder; that after the name of R. S. had been removed from the books, the directors had no power, under the clauses of the deed, to again introduce his name; that as the *scire facias* was issued by the creditor at the instance of the company for their own purposes, they must pay the costs, and an injunction was granted to restrain the levying of execution upon the judgment. *Shortridge v. Bosanquet*, 331.

See CHARITIES.

BANKRUPT.

1. *Petition to Stay Certificate.*] Upon a petition to stay the bankrupt's certificate, coming on to be heard, it appeared that the petitioners had not been able to serve the petition upon the bankrupt, he having gone out of the jurisdiction. The court dismissed the petition, with costs as against the assignees; but, upon the petitioners undertaking not to file another petition, without costs as against the bankrupt. *Belton, in re*, 50.
2. *Act of 1849, s. 201.*] In estimating the loss upon a contract for the purchase or sale of government or other stock, with reference to the question whether a bankrupt, by such contract, has been brought within the penal provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, the broker's commission must be included, and the gross amount of the loss arising from the variation in the price of the stock, added to the commission taken as the measure of the loss. Therefore, where a bankrupt had, within a year of the date of his petition for adjudication, lost, upon a contract for the purchase of railway stock, a sum, exclusive of the broker's commission, slightly less than 200*l.*, but which, when added to the broker's commission upon the purchase, made up a sum slightly exceeding 200*l.*, the bankrupt was held liable to the penalty. *Copeland, in re*, 93.
3. *Meaning of Contract.*] The word "contract," used in the section of the statute, includes "contracts;" and therefore the bankrupt is liable to the penalty of the statute where he has lost within the period mentioned therein, 200*l.*, arising from the aggregate of losses upon several contracts. *Ib.*
4. *Railway Shares.*] *Semble*, railway shares, as distinguished from railway stock, are within the 201st section of the Bankrupt Law Consolidation Act, 1849, which pro-

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vides that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any contract for the purchase or sale of any government or other stock. *Ib.*

5. *Railway Stock.*] And *semble*, per Lord CRANWORTH, L. J., that a contract for the purchase of railway stock, not performed by a transfer of the stock within one week after the contract, but carried over from time to time by means of continuation contracts with the broker, is within the provision of the 201st section of the Bankrupt Law Consolidation Act, 1849, that no bankrupt shall be entitled to a certificate who has, within the period mentioned in the act, lost 200*l.* by any sort of gaming or wagering. *Ib.*
6. *Payment of Laborers.*] Drawers, employed in the excavation of mines, held not entitled, under the 169th section of the Bankrupt Law Consolidation Act, to payment of wages out of the estate of the bankrupt proprietors of the mines. *Eckersley, ex parte*, 215.
7. *Miners.*] By the custom of mining districts in Lancashire, a collier or excavator, on being hired by the owners or manager of the mine, brings with him an assistant workman, called a drawer, with whom he divides in proportions agreed upon between themselves, the gross earnings of the two, which are paid by the manager to the collier alone, but in proportion to the work done by the two. The drawer is always hired by the collier, but sometimes upon the recommendation of the manager, and the collier keeps or dismisses him as he pleases, the manager, however, exercising a power to dismiss either the collier or the drawer for misconduct, and also a veto in case of improper dismissal of the drawer by the collier: —
Held, upon the bankruptcy of certain proprietors of mines in Lancashire, that the drawers of the mines were not laborers or workmen of the bankrupts entitled to payment of their wages in full, under the 169th section of the Bankrupt Consolidation Act, 1849. *Ib.*
8. *Consolidation Act, s. 20.*] Where, upon an application being made to the Court of Bankruptcy in London, the senior commissioner, having transacted the business before him, had left the court for the day, this was held to be an unavoidable absence within the meaning of the 20th section of the Bankrupt Law Consolidation Act, so as to enable a junior commissioner, then present in court, to act for the senior commissioner in the matter of the application. *Sewall, in re*, 301.
9. *Change of Venue.*] Where the petition of adjudication had been filed in the country district in which the bankrupt resided and had his property, but the great majority of the creditors resided in London and elsewhere, out of the district in which the petition had been filed, the court, upon the application of one of such creditors, made with the consent of the others, directed the removal of the petition, and of proceedings thereunder, from the country district to the Court of Bankruptcy in London. *Ib.*
10. *Administration Suit.*] In 1815, A, a trader in Somersetshire, was made a bankrupt but did not obtain his certificate. In 1817, A recommenced business in Suffolk, which he continued to carry on until his death, in 1852. A appointed B his executor, who proved the will. On the petition of one of the creditors of A, subsequently to the bankruptcy, an order was made by the commissioner of the district in which A had been made a bankrupt, that the official assignee of A's estate should administer his estate by paying first the funeral and testamentary expenses of A, and his creditors subsequently to the bankruptcy, then the creditors previously to the bankruptcy, and handing over the surplus to B as executor. A claim was afterwards filed in chancery by B for the administration of the estate of A: —
Held, that notwithstanding the order made by the commissioner, the estate of A ought to be administered by B, as executor, and that the usual administration decree ought to be made on the claim. *Tucker v. Hernaman*, 463.
11. *Leave to Surrender.*] *Semble*, that the commissioner has jurisdiction to accept the bankrupt's surrender after the time fixed by the advertisement: and where the commissioner considered that he had no such jurisdiction without the leave of the Vice-Chancellor, the Vice-Chancellor gave the leave, although not impressed with any favorable opinion towards the bankrupt, holding the surrender to be for the benefit of the creditors generally. *Atkinson, in re*, 513.

Chancery.

12. *Banker.*] A banker, who has pledged a short bill of a customer, is excluded from a certificate. *Sturt, ex parte*, 515.
13. *Calls.*] A joint-stock company, completely registered, became bankrupt. One of the members of the company had previously been declared bankrupt, and had obtained his certificate. The Master placed the bankrupt's name on the list of contributories, and calls were made by the Master on him for contributions to discharge the liabilities of the company incurred before his bankruptcy: —
Held, on his appeal, that his certificate was a bar to the liabilities to satisfy which the calls were made; and that the bankrupt's name ought to be removed from the list of contributories. *Chapple's case*, 516.
14. *Certificate.*] Where the usual course of dealing carried on by the bankrupt, who had traded without capital, had been to purchase goods, and immediately afterwards to raise money by pledging them, and it appeared that this was done, not for a purpose merely dishonest, but in accordance with the custom in his trade, and with the *bonâ fide* expectation of being able afterwards, on a rise in the market price of the goods, to redeem the goods and sell them at a profit, it was held that this was not equivalent to the offence of contracting debts "by any manner of fraud, or by means of false pretences," within the meaning of the 256th section of the Bankrupt Law Consolidation Act, 1849. *Manico, ex parte*, 594.
15. The 256th section of the statute is to receive a strict, rather than a loose construction, as against the bankrupt; and'
Semle, that where one only of the offences enumerated in the 256th section has been committed, it is not imperative upon the court to inflict the full penalty specified in the statute; but that it has a discretion, upon the circumstances, to award a minor degree of punishment. *Id.*

BANKRUPTCY.

See INJUNCTION.

BASTARD.

See WILL.

BEQUEST.

See WILL.

BOND.

In Restraint of Marriage.]

See WILL.

BURDEN OF PROOF.

Consideration.] A post-nuptial settlement, purported to have been made in consideration of natural love and affection, and for divers other good and valuable considerations: —

Held, that the onus of proving that some valuable consideration actually passed, lay on the party sustaining the deed. *Kelson v. Kelson*, 107.

BRITISH FUNDS.

Meaning of, in a Will.]

See ANNUITY. WILL.

Chancery.

CALLS.

See CONTRIBUTORY. JOINT-STOCK COMPANY. WINDING-UP ACTS.

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CHARITIES.

1. *Bequest to — Mortmain Act.*] By a deed establishing a joint-stock bank, it was declared, amongst other things, that the directors should accumulate unemployed capital, and that for that purpose they might invest the same on mortgage or purchase of freehold, copyhold, or leasehold lands, tenements, and hereditaments in Great Britain, and might from time to time sell the same, and re-invest in like manner. And it was declared by the deed "that all the property of the company, as between the shareholders thereof, and as between the respective real and personal representatives, should always be considered and deemed to be personal estate." *M.*, a shareholder, by his will, bequeathed his shares in the bank to trustees, to pay the dividends to his wife for life, and after her death, to sell, and invest the proceeds in government securities, for certain charities. *M.* died, and at the time of his death, the property of the bank consisted of, amongst other things, freehold and copyhold hereditaments, and money due on mortgage of freehold, copyhold, or leasehold hereditaments:—

Held, by Lord St. LEONARDS, C., reversing the decision below, and following the opinion of the Court of Common Pleas that the bequest to the charities was a good bequest, and not effected by the Statute of Mortmain. *Myers v. Perigal*, 109.

2. *Joint-Stock Companies.*] Per Lord TRURO, C. Distinction between joint-stock companies established by deed, and those established by act of parliament. *Ib.*

3. Effect of a declaration that the partnership assets are to be considered personal estate. *Ib.*

4. *Charter.*] The Hospital of St. John, in the city of Exeter, was incorporated by letters-patent of King Charles I., and the mayor, recorder, aldermen, and common council of the said city, for the time being, were thereby appointed to be governors of the said hospital, and of the lands, revenues, and goods thereof, and they were to have a common seal. The recorder was not, prior to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, a member of the corporation, but he was an officer elected by the corporation:—

Held, that the circumstance of the recorder being a member of the corporation of St. John, but not of the municipal corporation, did not prevent this case from falling within the 71st section of the Municipal Corporation Act. *Attorney-General v. Corporation of Exeter*, 242.

CHILDREN.

Bequest to Children, means Legitimate Children.]

See WILL.

CHURCH-WARDENS.

See INFORMATION.

Chancery.

COERCION.

See ANNUITY.

CONDONATION.

See HUSBAND AND WIFE.

CONFIRMATION.

See FRAUDULENT CONVEYANCE.

CONFLICT OF LAWS.

See PROMISSORY NOTE.

CONSIDERATION.

Burden of Proving.]

See BURDEN OF PROOF.

CONSTRUCTION.

Of Will.]

See WILL.

Of Deed.]

See DEED.

Of Contract.]

See CONTRACT.

Of Covenant.]

See COVENANT.

CONTRACT.

1. *By Letters.]* A vendor, C., wrote to his own solicitor, "H. has agreed to purchase my estate in this county for 60,000L., including the timber. . . . I have shown this to H., and given him a copy, not signed, as a memorandum." A month afterwards, in the course of correspondence concerning the terms of a formal agreement which was to be prepared, the purchaser, H., wrote to the same solicitor of the vendor, "I beg to know when you will forward the agreement to be entered into with C. relative to the purchase I have concluded with him for his estate in this county."

Held, that these two letters, taken in connection with other correspondence, referred to the agreement and memorandum mentioned in C.'s letter, and with it constituted evidence of a contract, so as to bind both C. and H., and that thereupon H. had a devisable interest in the estate. *Morgan v. Holford*, 174.

2. If the last letter had not been written, so that there had been only evidence in writing to bind C., *semble*, that H. would still have had a devisable interest; *sed quare. Ib.*

Meaning of.]

See BANKRUPT.

See EVIDENCE. TRUSTS.

CONTRIBUTION.

Right of.] There is no right of contribution between defendants who have protected themselves against a demand by setting up the statute, and other defendants who might equally have set up the statute, but who, having neglected so to do, are found by the decree to be liable to the plaintiffs. *Fordham v. Wallis*, 182.

CONTRIBUTORY.

Winding-up Acts.] A member of the committee of management of an abortive railway company attended many of the meetings, but he did not attend the only meeting at which the only unsatisfied debt of the company (being a debt to its engineer) was contracted; he, however, attended a subsequent meeting, at which the report of the engineer was received and adopted:—

Held, that, *primâ facie*, the claim of the engineer was a liability of the company within the meaning of the Winding-up Acts; and that, although the member was not directly liable to the engineer, he was liable to the persons liable to the engineer to contribute ratably with them; and the member's name was retained on the list of contributories. *Norbury's case*, 522.

See JOINT-STOCK COMPANY. WINDING-UP ACTS.

COPYRIGHT.

1. *Registration — Piracy.*] Where the first edition of a book had been published before the Copyright Act was passed, but subsequent editions had not been registered:—

Held, that such parts of the book as were in the first edition were protected, but that no suit could be maintained as to the parts introduced in the subsequent editions. *Murray v. Bogue*, 165.

2. A charge of piracy of an English book cannot be rebutted by showing that the part complained of was copied from a foreign book, which foreign book appeared to be copied from the English book. *Id.*

3. *Injunction.*] M. published a guide book, partly original, partly compiled. W., who had never been in the country described, was employed by B. to write a guide book to the same country. W. compiled his book partly from foreign works and partly from original manuscript, and appeared to have used M.'s work, but not unfairly:—

Held, that B. could not be restrained from publishing the guide book of W. *Id.*

CORPORATION.

Public Health Act.] Upon a petition presented by the Llanelly Local Board of Health, it was held, that the local board was not a body corporate under the Public Health Act, 11 & 12 Vict. c. 63; and must sue in the name of their clerk, as directed by the 138th section. *The Local Board of Health, ex parte*, 422.

COSTS.

1. *Allowance to Executors.*] A suit was instituted by husband and wife, against the personal representative of the executor of a testator, for the wife's share of a specific legacy bequeathed to four persons. The personal representative of the executor died, and thereby the suit became abated. This suit was abandoned, and another against other parties was instituted.

The costs of the representative of the executor of this abandoned suit were allowed in the accounts, as against the original testator's general personal estate. *Trail v. Bull*, 1.

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2. *Security for.*] The plaintiff was described in the bill as "of Fort William, Inverness, in the kingdom of Scotland, but now residing at 8 Edmund Place, Aldersgate street, London." The defendant's affidavits stated that the plaintiff's residence and business were in Scotland, and that he had recently taken furnished lodgings in London, but not for any stated time. No affidavit was filed in reply to this part of the case :—
Held, on motion for that purpose, that the plaintiff must give security for costs. *Ainslie v. Sims*, 8.
3. *Counsel Fees.*] Counsel's fees for settling a mortgage deed, on behalf of a mortgagee advancing money ordered to be raised in a suit, were directed to be allowed, in taxing the mortgagee's costs. *Nicholson v. Jeyes*, 21.
4. *Legatee's Suit.*] Where the fund is insufficient, a legatee, filing a bill on behalf of himself and all the other legatees to have the estate administered, is entitled to costs as between solicitor and client. *Waldron v. Frances*, 37.
5. *Of Motion.*] The costs of an abandoned motion must be applied for, on the next seal after that for which notice of motion was given. *Woodcock v. Oxford Railway Co.*, 54.
6. *By Official Manager.*] A suit, undertaken by some shareholders in a railway company, on behalf of themselves and all others, against some of the directors, had been directed by the Master, to whom the winding-up was referred, to be continued and prosecuted by the official manager. At the hearing it was dismissed by Sir G. J. Turner, V. C., with costs, to be paid by the official manager. A subsequent application was made to have the order rectified, so as to make the costs payable by the official manager personally. Upon that application the order made at the hearing was varied by inserting "Mr. T." (the name of the official manager,) between the words in the original order, "costs to be paid by," and "the official manager :"—
Held, that the insertion of the name in this manner, did not render the official manager liable to pay costs, otherwise than in his official capacity; and a subpoena and attachment, which had been issued against him on his neglecting to pay such costs personally, were respectively discharged, and quashed accordingly, but without costs. *Grand Trunk Railway v. Brodie*, 158. [But see below.]
7. *By Official Manager.*] Where a suit, originally commenced by one on behalf of the other shareholders and scripholders of an abortive railway company, (except the defendants,) and afterwards (upon an order to wind up the affairs of the company, under the Joint-Stock Companies Winding-up Acts, being obtained) ordered by the Master to be prosecuted by the official manager, under the Winding-up Act, 11 & 12 Vict. c. 45, s. 58, was, upon the hearing, dismissed, on the ground that it had been improperly instituted, and ought not to have been adopted by the official manager, it was—
Held, that the court had jurisdiction to direct the costs to be paid personally by the official manager, and that the words of the order, "dismiss the bill, with costs, to be paid by W. T., the official manager," were sufficient to support a subpoena and attachment for costs against W. T. personally. *Grand Trunk Railway Co. v. Brodie*, 283.
8. *Quære*, per Sir J. L. Knight Bruce, L. J., whether the 53d section of the statute is applicable to a suit so framed? And held, *per eundem*, that the 56th section does not apply to such a suit. *Id.*
9. *Winding-up Acts.*] Proceedings were taken in the Master's office by the official manager, upon which he obtained the order of the Master for the production of an account of certain payments. The parties ordered to produce this account appealed, and the court discharged the order :—
Held, that the proceedings being, in the opinion of the Court of Appeal, improper, the official manager must pay the costs before the Master, but that the costs of supporting the order of the Master, in the Court of Appeal, must be paid out of the estate; the former being without prejudice to any order the Master might make as to indemnity out of the estate. *Woolmer, ex parte*, 483.
10. *Set-off.*] Exceptions for insufficiency were heard before the court in the first in-

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stance, under Sir G. Turner's Act; the costs of those allowed were set off against those disallowed. *Willis v. Childs*, 512.

11. *Taxation.*] A was retained by four persons, B, C, D, and E, defendants to a suit in chancery, to act for them in the suit. A took some steps for B and C jointly, and other steps for B, C, and D, jointly, and so on. A delivered his bill of costs to B, which, at the instance of B, was referred to the Master for taxation. The Master taxed the bill on the principle that, for the joint costs of B and C, B was liable for half only; for the joint costs of B, C and D, B was liable to a third only, and so on:—

Held, that, according to the practice of the court, this method of taxation was right. *Colquhoun*, in re, 453.

12. *Mortgage.*] In a foreclosure suit, the bill alleged that the plaintiff, the first mortgagee, had applied to the defendants, who were subsequent mortgagees, to pay his mortgage debt and interest, and that they had refused so to do. The defendants, by their answer, stated that the plaintiff had not made any application to them, and that, if he had, they would have released and disclaimed all interest, and they then disclaimed. At the hearing of the cause:—

Held, that the plaintiff was bound to pay the defendants their costs. *Gurney v. Jackson*, 419.

13. *Security for.*] Where a plaintiff goes out of the jurisdiction, pending a suit, for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs, the court will direct him to give security for costs. *Blakeney v. Dufour*, 387.

See *Beaufort v. Patrick*, 34; *Belton*, in re, 50; *Buckley's Trust*, in re, 9; *Frear v. Hesse*, 154; *Hopkin v. Hopkin*, 11; *Shortridge v. Bosanquet*, 331.

See PAYMENT OUT OF COURT. PRACTICE.

COUNSELLOR.

Fees of.]

See COSTS.

COVENANT.

1. *Quiet Enjoyment—Breach.*] A, in 1842, conveyed land to B, and entered into a covenant for quiet enjoyment, but not into any covenants for title. B mortgaged to C in the same year. In 1846, an ejectment was brought, which B defended, but was evicted. B then sued A at law, for damages upon the covenant, who pleaded that at the time of eviction the legal estate was in C, the mortgagee. B submitted to the plea, and afterwards A, the original vendor, paid off the mortgage, and obtained possession of the mortgage deed, whereupon was an acknowledgment of the receipt of the mortgage money, and that the same was in full discharge of the same, and interest, and all right of action or demand of C, the mortgagee, against A in respect of the covenants in the conveyance to B. B filed a bill against A, praying that B might be declared entitled to the benefit of the covenant, and that a reference might be sent to the Master to assess the damages sustained by him by reason of the breach of it. The court below dismissed the bill: but on appeal:—

Held, that the plaintiff was entitled to have the damages assessed, and gave him leave to bring an action upon the covenant, and restrained A the defendant, the original vendor, from setting up the mortgage deed or indorsement by way of defence. *Thorn-ton v. Court*, 231.

2. *Performance of.*] Lessee covenanted to insure the demised premises in the joint names of the lessor and lessee. The premises afterwards became vested in an under lessee, who insured in the name of the original lessor alone, or of his representatives. It was not known whether the original lessee was alive or dead, or who was his representative:—

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Held, that this was a sufficient compliance with the covenant, so as to prevent the lessor from taking advantage of a proviso in the lease, for reentry on non-performance of the covenants. *Havens v. Middleton*, 263.

3. *Construction of.*] J. F., by will, charged certain real estates with the payment of four legacies of 5,000*l.* each, and left the estates so charged to J. B. By his marriage settlement, J. B. covenanted with the trustees of the settlement to discharge the lands, and to pay the legacies, and to settle the lands, free from the legacies, to certain uses, the usual uses and trusts upon a marriage. He, however, only paid off one of the said four legacies, and died. In a suit between his personal representatives and the persons entitled to the real estate:—

Held, that the land was, by the covenant in J. B.'s marriage settlement, entitled to be exonerated out of his personal estate. *Barham v. Clarendon*, 310.

4. *For Production of Deeds.*] An agreement on the sale of an estate, that the title deeds should be delivered to the purchaser on the completion of the contract; but, as the deeds related also to other property belonging to the vendors, the purchasers should enter into, or procure to be entered into, one or more proper and sufficient covenant or covenants with the vendors for the production and delivery of copies of such deeds. The purchasers were trustees, and entered into the contract in pursuance of the directions in the will of their testator, for the investment of his personal estate in the purchase of lands, to be settled to certain uses creating estates for life, with remainder over in strict settlement. The estate was conveyed by the vendors to the purchasers to the uses declared by the will of their testator:—

Held, that the agreement to enter into a proper and sufficient covenant for the production of the deeds, did not mean that the vendors should be entitled to a covenant which would secure to them their production at all times and under all circumstances; that the word "sufficient" was connected with the word "proper;" that the extent and sufficiency of the covenant must in a great degree depend on the mode in which the conveyance was taken; that the releases to uses do not stand in a worse position than trustees, who, according to the ordinary rule of the court, are required to covenant for their own acts only; and that the court would not compel the purchasers, who were only releasees to uses, — especially after the uses were executed by the statute, — to enter into such covenants. *Onslow v. Lonsborough*, 542.

DEEDS.

1. *One Transaction.*] The question, whether several deeds are part of the same transaction, or are separate and distinct transactions, depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into, or connected with, each other. *Harman v. Richards*, 548.

2. *Settlement.*] Evidence of surrounding circumstances, on which the court *Held*, a settlement, that, standing alone, would have been fraudulent against creditors, to be connected with and part of the same transaction with several purchase-deeds of even date, to which some only of the same persons were parties. *Id.*

3. *Consideration.*] The release and assignment by a married woman of her life-interest in her separate estate, although fettered by a restriction against anticipation, was

Held, to form a consideration for a settlement by another person; for, though the married woman could not pass her future interest, she might and did thereby release her past income; and the question of consideration moreover depended, not upon the point whether her assignment passed her interest, but upon the question whether her concurrence enabled the settlement to be made. *Id.*

4. *Agreement.*] An agreement by a creditor not to take proceedings against the debtor, during his life, nor against the debtor's estate, during the life of his wife, if she should survive him, construed (as to the latter clause) to mean, that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and, therefore, the creditor

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obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Ib.*

5. Parties to a series of deeds, considered as stipulating according to the rights which they had. *Ib.*

6. Consideration for a settlement being found to exist, it was *Held*, to extend to the whole, and not to a part only, of the property, which was the subject of it. *Ib.*

7. A deed, though made for valuable consideration, may be affected by *male fides*. *Ib.*

See FRAUDULENT CONVEYANCE.

DEVISABLE INTEREST.

See FRAUDULENT CONVEYANCE.

DISCLAIMER.

See COSTS. PRACTICE.

DISCOVERY.

Delivery of Documents.] Land agents, paid by commission, will be directed to deliver up such maps, plans, and other documents relating to the estates as were made or collected by them in the course of their employment, even though it is alleged that they were made for their own private use. *Beresford v. Driver*, 404.

DISTRESS.

Not Enjoined — Although Illegal.]

See INJUNCTION.

DOMICIL.

See PROMISSORY NOTE.

DOWER.

Election of Widow — Increase of Value.] A testator, by his will, gave all his freehold and leasehold messuages, tenements, &c., to trustees for all his estate and interest therein, on trust, to sell and apply the proceeds in manner thereafter declared; he then gave certain legacies out of his personal estate, and the residue thereof, together with the proceeds to be derived from the sale of his freehold and leasehold estate, he directed to be divided into four parts; one fourth he gave to his wife and the other three fourths to certain other relations. Amongst other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The testator, after the date of his will, had leased parts of his estates for terms of years, with an option to the lessees to purchase, and had permitted one lessee to erect buildings, which had been done, and the estate was thereby greatly improved: — *Held*, that the widow of the testator was not to be put to her election, but was entitled to dower, as well as to the benefits given her by the will, and that she would take her dower according to the existing value of the estate, since the acts by which the value of the property had been altered were not her acts. *Gibson v. Gibson*, 349.

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ELECTION.

See DOWER.

EQUITY OF REDEMPTION.

Mortgage by Married Woman.] Observations on the rule, that in a mortgage of a married woman's estate, the old uses, subject to the mortgage, will not be considered to be changed by the mere circumstance that the equity of redemption is reserved differently. Per Sir G. J. Turner, L. J. *Eddleston v. Collins*, 296.

EVIDENCE.

1. *Examination of Defendant Abroad.*] Where a defendant, whose evidence it was desired to take, was resident in Australia, and it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first-named examiner being capable; and liberty was, in the same order, reserved to the principal defendant in the cause, to appoint some person in the colony to attend the taking of the examination on his behalf. *Crafts v. Middleton*, 88.
2. *Certificate of Deed.*] A certificate of the registration of a deed by a registrar of deeds in a colony, who was not authorized to administer an oath, is not made evidence by the 22d section of the Chancery Amendment Act, but the signature of the registrar must be proved. *Baillie v. Jackson*, 131.
3. *Sentence of Ecclesiastical Court.*] A married B by license in 1798, during the time that the 26 Geo. 2, c. 33, was in force. In 1802 B commenced a suit, in the Ecclesiastical Court, against A, of nullity of marriage, on the ground that she was a minor at the time of the marriage, and that her father's consent had not been given. It was proved in the suit that A was a minor, and that her father was absent at the time of the marriage. A sentence of nullity was pronounced in June, 1802. In May, 1802, C, the only child of the alleged marriage, was born. Upon an inquiry who was the heir at law of A, C claimed to be sole heiress, and objected to the reception, as evidence, of the sentence of the Ecclesiastical Court, on the ground that it had been fraudulently and collusively obtained. In support of this case, C produced a bond, given by A in 1801, for securing an annuity to B for her life for her separate use, in which it was declared that it should remain good notwithstanding a sentence of nullity of marriage, and produced a witness to prove conversations between A and B previously to the suit, in which they agreed that A should give B an annuity, and that legal proceedings to annul the marriage should be taken:—
Held, that the sentence was not fraudulently or collusively obtained, and was admissible in evidence. *Harrison v. Corporation of Southampton*, 364.
4. *Agency — Recital.*] R., after some negotiations, contracted with the assignees of Messrs. E., for the purchase of certain claims of the bankrupts against the estate of G. F. B. He represented that he acted on behalf of himself and M., who was clearly cognizant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. & M. This was submitted to M., who approved of it; and at that time, he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase:—
Held, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed, would not bind a party who had done nothing to recognize it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M., with costs; but as R. admitted the plaintiff's case, a decree was made against him without costs. *Foligno v. Martin*, 475.

To Explain a Will.]

See BURDEN OF PROOF. WILL.

EXECUTORS.

1. *Default in — Practice.*] A case of wilful default and negligence was alleged on the pleadings against executors for not having sold the testator's estate, and, at the first hearing, accounts and inquiries were directed :—
Held, on further directions, that as at the original hearing it was not ascertained who the parties entitled under the will were, the defendants were still chargeable with their breach of duty. *Pattenden v. Hobson*, 16.
2. *Liability of.*] *Held*, also, that as the testator's widow, a co-executrix with another defendant, had received the rents and profits during the whole period, her estate was liable to make good the surplus over what she would have been entitled to, in case there had been a sale and investment according to the will. *Ib.*
3. *Rights of to Lapsed Legacy.*] A testator, by his will, dated in 1822, appointed A (his widow) and B his executors, and gave B a legacy for his trouble, and bequeathed his personal estate to A and B, on the usual trusts for conversion, and directed that the income of the proceeds should be paid to A for life, and that after her death, his trustees, or the survivor of them, or the executors or administrators of such survivor, should stand possessed of one half of the capital for A, her executors, administrators, and assigns. A died in the lifetime of the testator. The testator had been illegitimate :—
Held, that the lapsed part of the testator's estate belonged to the crown, and not to B, the executor. *Powell v. Marett*, 406.
4. *Two Estates in one Suit.*] Cases in which the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit. *Young v. Hodges*, 570.
5. *Sale by.*] By an assignment, by one of the several executors, of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will, (but not stating the fact that a third executor had also subsequently proved,) and reciting that the executors had assented to the bequest to the assignor, it was witnessed that the assignor, in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The assignor, in his character of executor, was, at the time of the assignment, indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf the estate of the testatrix, to set aside the assignment, and recover the title deeds, it was
Held, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the court would not disturb the sale. *Cole v. Miles*, 582.
6. Whether, without any express assent by executors to a bequest of a leasehold estate, the entering of the legatee into possession and receipt of the rents and profits, with the knowledge of and without any objection from the executors, does not amount to an assent by them — *Quære. Ib.*

See COSTS.

Allowance of Costs to.]

See JOINT-STOCK COMPANY. LIMITATIONS.

FORECLOSURE SUIT.

See COSTS. MORTGAGE.

Chancery.

FOREIGN LAW.

See INJUNCTION.

FOREIGNER.

Security for Costs.]

See COSTS.

FORMER SUIT.

Costs of.]

See COSTS.

FRAUDULENT CONVEYANCE.

1. *Confirmation.*] To a bill by an heir at law, charging that the defendant A was in the possession of the estate of the ancestor under a conveyance impeachable on the ground of fraud, and praying that the conveyance might be set aside and that any testamentary disposition thereof by way of confirmation might be declared void, A pleaded the will of the ancestor, by which, after reciting that certain members of his family had threatened to impeach the conveyance, he thereby confirmed the same, and devised the estate to A in fee. The plea was allowed, affirming the order of the court below. *Stump v. Gaby*, 357.
2. *Devisable Interest.*] Where a testator has a right to set aside a voidable conveyance, this is an equitable estate in him, descendible to his heir, and which he may dispose of by his will. *Ib.*
3. *Confirmation by Deed.*] Distinction between a confirmation by deed and by testamentary disposition of a conveyance liable to be avoided on the ground of fraud. *Ib.*

FRAUDS, STATUTE OF.

Part Performance.] To a parol agreement by a father to convey property in consideration of the marriage, then contemplated, of his daughter, followed by delivery of possession to the husband after the marriage, the Statute of Frauds cannot be set up by way of defence. Such a contract would be decreed to be specifically performed. *Surcome v. Pinniger*, 212.

FRAUD.

See DEED. TRADE MARKS.

GAMING.

See BANKRUPT.

GUARDIAN.

See INFANT.

HUSBAND AND WIFE.

1. *Separation Deed.*] Reconciliation and re-cohabitation avoid a deed of separation, but the husband may nevertheless so conduct himself afterwards as to contract a new obligation on the footing of the separation deed. *Webster v. Webster*, 278.
2. *Condonation.*] Mere payments to the wife of an annuity for life, provided by the deed, though continued after a reconciliation, and after the death of the husband, are not sufficient evidence of such a new obligation. *Ib.*
3. *Plea.*] Form of plea of condonation sufficient without answer to a bill by the widow, on behalf of herself and all other creditors, against the assets of the husband, deceased, claiming as a creditor of his estate under the deed of separation. *Ib.*
4. *Her Right to Maintenance.*] A married woman, whose husband did not maintain her:—
Held, not to be entitled, as against a particular assignee of the husband, to maintenance out of the income of the real and personal estate to which she was entitled in equity for her life. *Tidd v. Lister*, 560.
5. *Rights of Purchasers.*] As against purchasers for value from the husband, of the life-interest of the wife, equity will follow the law, which gives to the husband the power of dealing with the income of his wife's property, and will not put in force the rule that he who comes into equity must do equity, whereby purchasers would be involved in inquiries into the relations between husband and wife, their property and means of maintenance. *Ib.*
6. *Interest of Wife.*] Distinctions between the cases in which a wife takes an absolute interest in her property, and those in which she takes a life-interest only, and between cases of an assignment by the husband of the wife's property to his general assignee on his bankruptcy or insolvency, and of an assignment to a particular assignee for value. *Ib.*
7. *Receiver.*] Moneys coming to the hands of the receiver in a cause in which the husband and wife are parties, might be considered as not reduced into possession by the husband; but where the husband has created encumbrances on the property in which he became interested in right of his wife, and the court has ordered the moneys to be applied in favor of the encumbrancers, the effect is to divest the title, and reduce into possession the moneys which were the subject of the order. *Ib.*
8. One party having a charge on freehold and copyhold estate, and another party on the freehold estate only, it was
Held, that the latter was entitled to require that the former should be satisfied out of the copyhold estate, so far as it would extend. *Ib.*

See SETTLEMENT.

INHERITANCE.

Meaning of—in a Will.

See WILL.

INFANT.

1. *Custody of.*] The stat. 2 & 3 Vict. c. 54, has introduced, as controlling the paternal right to the exclusive custody of his infant child, two considerations, namely, of marital duty to be observed towards the wife, and of the interests of the child to be consulted. But if these two objects can be attained consistently with the father's retaining the custody of the child, his common-law paternal right will not be disturbed. *Woodward, ex parte*, 77.
2. *Guardians ad litem.*] Guardian *ad litem* appointed to an infant defendant within the jurisdiction, without his appearing in court, and without a commission. *Egremont v. Egremont*, 81.

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3. *Guardian.*] The court refused to appoint an English guardian to an infant residing with his mother in America, without associating the mother in the guardianship, or to order the payment of an annual sum to the English guardian, until a communication had first been made with the mother on the subject. *Lockwood v. Fenton*, 90.
4. *Education.*] Under a marriage settlement, stock was vested in trustees, in trust to pay the interest and dividends to the wife for life, remainder to the husband for life, with a power to them, and the survivor to appoint the principal among the children of the marriage. The wife died, and the husband appointed a third part thereof absolutely and at once, in trust for an infant child, payment to be postponed till twenty-one. The court, on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred, and to be incurred for his education as a cadet, and his advancement in India, granted the prayer of the petition, so far as related to payment of part of the expenses incurred, and as to the expense of education and residence as a cadet at Addiscombe, and ordered the rest of the petition to stand over. *Lane, in re*, 162.
5. *May be a Deputy Steward.*] A surrender taken out of court, of copyhold lands of a married woman, and requiring, therefore, her separate examination and consent, may be well taken by a deputy steward who is an infant. (*Dubitante* Sir J. L. Knight Bruce, L. J.) *Eddleston v. Collins*, 296.
6. *Advancement to.*] Part of the principal in court, to which infants were entitled, advanced towards enabling the infants to emigrate with their guardian. *Clarke, in re*, 599.

INFORMATION.

Against Churchwardens.] An information was filed against A and B by name, they being churchwardens of a certain parish; the object of the information was for inquiries into the application of the rents and profits of the property of the parish, and for a scheme for the future arrangement of the estate. The court made the order, notwithstanding that the churchwardens were not parties in their official character. *Attorney-General v. Salkeld*, 160.

INJUNCTION.

1. *To Restrain an Illegal Distress.*] Where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction, to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment. *Drake v. West*, 367.
2. *Jurisdiction—English Bankruptcy.*] A Scotchman, who was resident and carried on trade in England, became bankrupt here, and subsequently succeeded to real estate in Scotland. The assignees under the bankruptcy possessed themselves of this real estate, as part of the estate to be administered under the bankruptcy, and they perfected their title according to the rules of the Scotch law. Mr. R., who alleged himself to be a creditor of the bankrupt, commenced an action in the Court of Session in Scotland against him, which was dropped, and another was brought against the assignees for the recovery of a dividend upon his claim, equal to the dividend paid and to be paid to the creditors under the bankruptcy, and in the latter action arrested the rents of the real estate in Scotland, of which the assignees had so possessed themselves, so as to prevent them from dealing with that property. The assignees filed a bill against R. for an injunction to restrain him from proceeding with the action in the Court of Session:—
Heid, overruling the decision of the court below, (where the injunction had been granted on the ground that the court had jurisdiction to restrain the proceedings,) that the injunction could not be sustained. *Pennell v. Roy*, 408.
3. *Practice.*] Where a special injunction has been obtained on affidavits, and on the

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answer coming in, the defendant moves to dissolve, such affidavits may be used against the answer. *Custance v. Cunningham*, 501.

4. *Undue Influence.*] An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore, that there had been a gift of it to him, subject to a trust for the transferor for life. An injunction to restrain the transfer and receipt of the dividends was continued. *Id.*
5. *Jurisdiction.*] The trustees of a turnpike road, which passed over a hill, were empowered to lower it when necessary. They applied to restrain an adjoining freeholder from making a tunnel under the road, on the ground that it would obstruct the future improvement of the road. The court, however, held, that it had no authority to interfere, and refused the application. *Cunliffe v. Whalley*, 503.

See BANK. COPYRIGHT. TRADE MARKS.

INSPECTION OF DOCUMENTS.

A plaintiff, under an order for himself, his solicitors, and agents, will not be allowed to take with him a relation to assist in the inspection of documents admitted by the defendants to be in their custody. *Summerfield v. Prichard*, 492.

INTEREST.

1. *Vendor and Purchaser.*] A purchase was to be completed on a given day, when the purchaser was to have possession, and it was provided, "that if, from any cause whatever," the purchase-money should not be then paid, the purchaser should pay interest. A delay of six months occurred from the default of the vendor in not furnishing proper abstracts:—
Held, that the purchaser must pay interest, unless he gave up the rent, during that period. *Cwope v. Bakewell*, 508.
2. *Annuity.*] Interest not allowed on the arrears of an annuity, and the discretion of this court, on the question, is not affected by the stat. 3 & 4 Will. 3, c. 42, s. 28. *Powell's Trust, in re*, 558.

The cases of *Hyde v. Price*, and *Crosce v. Bedingfield*, referred to their special circumstances. *Id.*

JOINT-STOCK COMPANY.

1. *Agreement with Lessees.*] A granted a lease of land to B in 1779. In 1794, an act was obtained for a canal, part of which was to pass over the land demised, and to be made by C. On the neglect or refusal of C, or of the other authorized persons to complete the respective portions of the canal within two years, the defaulter was to pay 500*l.* per annum until completion. C's portion of the canal was not completed within the time specified, but was subsequently made, under an arrangement between C and B, the lessee. No compensation was made to A in respect of his reversion, but all the acts of C were done with the consent of the proprietors of the lands, of whom A was one. In 1783, A mortgaged his reversion, which was sold in 1794, to D, under a decree of the court. The particulars of sale, contained a statement that the canal was to pass through the land. In 1844, the lease to B expired, and the devisees of D brought an action of ejectment against C, to recover the land covered by the canal, and obtained a verdict.
In a suit by C against the devisees of D, for an injunction to restrain further proceedings in the action, and for a conveyance to C:—
Held, 1st, that the time for making the canal was unlimited; subject, however, to the payment of 500*l.* per annum, after the expiration of the specified time, until completion. *Beaufort v. Patrick*, 28.
2. *Acquiescence.*] Secondly, that A had acquiesced, and was not entitled to the land. *Id.*

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3. Thirdly, That the devisees of D were not bound by the acts of A; but that D, having purchased with the knowledge that the canal was to remain for the benefit of the public, his devisees could not interfere with this easement. *Ib.*
4. But, fourthly, That they were entitled to compensation for the real, and not the fictitious, value of the land at the time the reversion fell in, with interest at 4 per cent. from that time, and on payment the devisees were to execute proper conveyances to C. *Ib.*
5. *Calls.*] In a suit for the administration of the estate of a deceased shareholder in a joint-stock banking company, the registered public officer presented a petition praying leave to prove as a creditor for the amount of a call made since the death of the shareholders in respect of the shares:—
Held, overruling the decision of the court below, that the deceased shareholder, having covenanted to pay all calls, and the shares having vested in his executors, as part of his estate, they by law became entitled to the benefits of the deed, and were liable for the calls, there being nothing in the deed of settlement of the company overruling the rule of law. *Heward v. Wheatley*, 432.

See BANK.

JOINT LIABILITY.

See PRINCIPAL AND SURETY.

JUDGMENT.

See SPECIFIC PERFORMANCE.

JURISDICTION.

1. *Of Court of Chancery.*] A married woman, donee of a general power of appointment over personal property comprised in her marriage settlement, by her will, appointed, gave, and bequeathed all the personal estate, which, by virtue of any power or authority, or by virtue of any separate right of property, she was competent to dispose of, to her executors therein named, upon certain trusts. Upon the death of the testatrix, probate of the will was granted to the executors, limited to the testatrix's interest in the property over which she had a power of disposition given to her by the deed creating the general power, and which by the will she had appointed and disposed of accordingly, but no further:—
Held, that the court had jurisdiction, under the 45th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, to entertain an application, by a beneficiary under the will, for a summons, requiring the executors named therein to show cause why an order for the administration of the personal estate of the testatrix should not be made. *Ashley v. Sewell*, 253.
2. *Of Court of Appeal.*] There is jurisdiction in the Court of Appeal (under the statute 14 & 15 Vict. c. 83) to correct an error in an order of the Lord Chancellor. *Attorney-General v. Corporation of Exeter*, 421.

See INJUNCTION.

LANDLORD AND TENANT.

1. *Priority of Debt for Rent.*] A landlord, creditor for rent against the estate of a deceased tenant, is entitled to rank above the ordinary simple contract creditors, under a decree for administration. But this right arises out of the relation of landlord and tenant, and is founded on the sacred regard which the law of England shows to rights arising from tenure, and does not apply to a debt claimed against the estate

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of a deceased debtor, who had entered upon the land under an agreement of such a nature, that his entry did not create a tenancy at a certain rent. *Vincent v. Godson*, 271.

2. *Demise.*] Agreement to grant and accept a lease of property in Jamaica, from the 1st December, 1847, for twenty-one years, at the clear yearly rent of 2,000L, the lease to contain certain covenants. The tenant entered into possession, and died in August, 1849, without having paid rent:—

Held, that this agreement would not have been an actual demise before the 8 & 9 Vict. c. 106, and that the entry thereunder created no tenancy, so as to give the landowner a right of distress, or to make any privity of estate between him and the intended lessee, and that, therefore, the owner in such case had not this right of priority. *Ib.*

3. *Jamaica.*] This curious result of the law of tenure does not apply to a demise of lands in Jamaica. *Ib.*

See COVENANT.

LAND-TAX.

Redemption by Guardian.] The guardian of an infant tenant in tail redeemed the land-tax on the estate but made no declaration, in pursuance of the 38 Geo. 3, c. 60, so as to make the land-tax a charge on the inheritance. In a suit by the guardian, who was also administrator of the infant tenant in tail, it was declared, that the land-tax was an annuity or rent charge in favor of the infant's personal estate; and the court directed proper deeds to be executed by the then tenant for life and tenant in tail, charging the estate with the amount of land-tax as an annuity. This was done by deeds not affecting the estate in remainder after the estate tail. On the death of the survivor of the tenant for life and tenant in tail, the personal representative of the infant claimed the benefit of the decree against the inheritance:—

Held, that the declaration effectually charged the inheritance; and (the legal charges executed by the tenant for life and tenant in tail having failed,) the tenant in remainder, after the determination of these estates, was directed legally to charge the estate with the annuity. *Ware v. Polhill*, 529.

LEGACY DUTY.

Annuity.] A testator devised lands to his son for life, with remainders over, and gave power to the son to charge these lands with an annuity for his wife, in bar of dower. The son charged the lands accordingly:—

Held, that such annuity was subject to legacy duty. *Sweeting v. Sweeting*, 97.

LETTERS.

Contract by.]

See VENDOR AND PURCHASER.

LEX LOCI.

See INJUNCTION. LANDLORD AND TENANT.

LIEN.

- 1 *Of Vendor.*] A special contract for the payment of purchase-money must be explicit to deprive a vendor of his lien upon the estate sold; and though a contract is stated in the conveyance of the estate, evidence may be given to show the real nature of the transaction, and a subsequent purchaser is bound to inquire whether it was accepted in substitution of the lien. *Frail v. Ellis*, 457.

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2. *Evidence.*] Where an estate was expressed to have been conveyed in consideration of 150*l.* down, and a bill of exchange for 800*l.* payable in three months:
Held, that the vendor might give evidence of the real nature of the transaction, and that his lien was not discharged; and a mortgagee having notice through the solicitor who had been employed in all the transactions, was bound to see that the vendor's claim for his purchase-money was satisfied. *Ib.*
3. *Vendor and Purchaser.*] A hotel keeper, who was also the owner, agreed, on the 24th of March, 1851, to sell his hotel, and to assist in carrying on the business for two years, receiving half the profits. The purchaser's wife (who was the hotel keeper's daughter) went on the premises and assisted in managing the concern. From the purchaser's letters, it appeared that he was not able to supply the funds necessary to carry on the business; and in a letter of the 24th of May, 1851, he wrote thus to the hotel keeper: "You must mortgage or sell the premises." He subsequently asked the hotel keeper to give him a mortgage on the hotel, for sums which he claimed to be due to him, and brought an action against the hotel keeper, for, among other things, a remuneration in respect of the services of his (the purchaser's) wife above-mentioned. The hotel keeper became bankrupt. Upon a claim filed by the purchaser against the assignees, claiming that they should elect specifically to perform the agreement, or that it should be declared that the purchaser was entitled to a lien for the sums he had advanced under the contract:—
Held, that although the purchaser would have been entitled to a lien, if the contract had failed through the vendor's default; yet that, as the purchaser had himself abandoned the contract, the purchaser was not entitled to any lien, and his claim was dismissed. *Dinn v. Grant*, 52*Q.*

LIMITATIONS.

1. *Executors — Part Payment.*] * G. S., by his will, dated in 1837, devised a particular estate, for providing for the payment of his debts, to his trustees, who were also his executors, and beneficially interested under other parts of his will. G. S. died in February, 1843. In August, 1849, a creditors' suit was instituted by F., claiming as personal representative of the payee of a joint and several promissory note made by the testator and another person, and dated 1826; and payments were proved to have been made, on account of interest due on such promissory note, on several different occasions in 1843, 1846, and 1847, by T. & Co., "as the agents and on behalf of the executors, the defendants. One of the executors of the testator had become bankrupt; the other two were stated to be now insolvent. The estate devised for payment of debts had not been sold with proper expedition; and though debts of the testator remained unsatisfied, considerable sums were alleged to have been paid on account of the legacies. The present bill sought to fix the executors for wilful default and breach of trust, and to get back the amounts paid to the legatees. All the defendants, except the executors and one other defendant, set up the Statute of Limitations:—
Held, first, that the executors, who had not set it up, were bound in their beneficial, as well as representative capacities, by the part payments on account proved to have been made. *Fordham v. Wallis*, 182.
2. *Admissions.*] Secondly, that the other defendant, who had not set up the statute, was also bound by the implied admission by the executors. *Ib.*
3. *Other Parties.*] Thirdly, that it was open to the other defendants, (except the residuary legatees,) to avail themselves of the statute; and that those who had set it up were accordingly entitled to have the bill dismissed as against them, but without costs. *Ib.*
4. *Residuary Legatees.*] Fourthly, that as to the residuary legatees, the payments to them, while there were debts outstanding, being a breach of trust, they could not set up the statute, but must refund the sums received. *Ib.*
5. *Joint Parties.*] *Semble*, one party is not to be bound by the admissions of another, so as to prevent the statute from running, unless in the case of a continuing joint contract. *Ib.*

Chancery.

6. *Annuity.*] A testator, by his will, gave to the plaintiff certain annuities, and devised his real estates to trustees upon trust for securing the same. Some of the annuities had fallen into arrear for eighteen years and upwards:—
Held, that the term being a subsisting term, the plaintiff was entitled to recover the entire arrears. *Cox v. Dolman*, 429.

LOCALITY.

Of Debt.]

See PROMISSORY NOTE.

MARRIAGE.

See FRAUDS, STATUTE OF.

Restraint of.]

See WILL.

MARRIAGE SETTLEMENT.

See TRUSTS.

MARSHALLING OF ASSETS

The doctrine of marshalling ought not to be resorted to, merely for the purpose of giving to a simple contract creditor, a longer period of limitation. *Fordham v. Wallis*, 182.

MORTGAGE.

1. *Sale.*] Under the statute 15 & 16 Vict. c. 86, s. 48, the court will not make a decree for sale, instead of foreclosure, without the consent of the mortgagor, except under special circumstances. *Probert v. Price*, 38.
2. *Power of Sale.*] Copyhold premises were surrendered in 1829, by a debtor, to the use of his creditor, his heirs and assigns, upon trust that he, his heirs, executors, administrators, or assigns, should sell the same, and out of the proceeds should pay to himself, his executors or administrators, 200*l.* then due, and interest. The creditor died in 1831. In 1851 his personal representatives contracted to sell the copyhold premises for 100*l.* The customary heir of the creditor was an infant. On the petition of the personal representative of the creditor, it appeared that the debtor had died intestate, and there was no personal representative, and that proof of the title of the customary heir would be very expensive. The court made an order vesting the legal estate in the copyhold premises in the purchaser, without any service either on the customary heir or on the personal representative of the debtor. *Wise, ex parte*, 517.

See COSTS.

When it Passes by a Will.]

See WILL.

MORTMAIN ACT.

See CHARITIES.

NE EXEAT.

1. *Affidavit.*] Where a writ of *ne exeat* had been granted on affidavits sworn before

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the plaintiff's own solicitor in the cause, the court discharged the writ with costs, and refused to put the defendant under terms not to bring an action:—
Semble, that the affidavits should state expressly that the property would be endangered if the writ was not granted. *Hopkin v. Hopkin*, 11.

2. *Irregularity.*] *Quære*, whether a second writ can be granted where the defendant has been arrested, and has put in bail on which he is afterwards discharged, on the ground that the affidavits were improperly sworn. *Ib.*

NEXT FRIEND.

See PRACTICE.

ONUS PROBANDI

See BURDEN OF PROOF.

PARENT AND CHILD.

See INFANT.

PARTICULARS.

Of Sale at Auction.]

See VENDOR AND PURCHASER.

PARTIES.

An estate was devised to A, for life, without impeachment of waste, with remainder to his issue in tail; with remainder to B, for life, without impeachment, &c.; with remainder to his issue in tail. A had no issue, and his assignees having committed equitable waste, it was held, that the right to the produce could not be determined until the death of A, as he might have issue who possibly would be entitled to an interest in such produce. *Lushington v. Boldero*, 507.

PARTNERSHIP.

See CHARITIES. TRUSTS.

PART PERFORMANCE.

See FRAUDS, STATUTE OF.

PAYMENT.

See LIEN. LIMITATIONS.

PAYMENT INTO COURT.

See TRUSTEE.

PAYMENT OUT OF COURT.

1. *Purchase-Money.*] Where an estate is directed to be sold, and the proceeds to be

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distributed, the persons entitled to receive the proceeds may petition for the payment out of money paid into court, under the Lands Clauses Consolidation Act, as purchase-money for part of the estate. *Melling v. Bird*, 130.

2. *Transfer of Accounts.*] A transfer of one account in court to another, is payment out of court, within the meaning of the act. *Ib.*
3. *Costs.*] Where one of several persons entitled, petitions under the act, and serves the other persons, it is not of course that the company should pay the costs of such respondents. *Ib.*

PEDIGREE.

Proof of.]

See PRODUCTION OF DOCUMENTS.

PETITION.

Income.] A deaf, dumb, and blind person petitioned for payment to herself of 7,000*l.*, carried to her separate account:—

Held, that she might be a petitioner without a next friend; but the court declined, without special reasons assigned, to make an order for payment of more than the income, for her benefit. *Biddulph's Trust, in re*, 581.

PIRACY.

See COPYRIGHT.

PLEADING.

1. *Averment of Representation.*] In claim for administration by residuary legatee, against executor of executrix, not having proved, it is not sufficient to aver merely that the defendant is executor of his testatrix, and that his testatrix was executrix of the testator in the cause. *Boulding v. Boulding*, 62.
2. *Cross Bill.*] *Semble*, a defendant cannot obtain relief against the plaintiff by impeaching his title by answer; that must be done by cross bill; and the ordinary course of the court is, not to stop the progress of the cause, unless the cross bill is filed in due time. Per Sir G. J. Turner, L. J. *Eddleston v. Collins*, 296.
3. *Impertinent Matter.*] Matter ought not, at the commencement of a suit, to be treated as impertinent, which may, at the hearing, be found relevant. *Reeves v. Baker*, 509.
4. *Scandal.*] A trustee called on the defendant to set forth whether, for the reasons in the bill stated, or some other and what reasons, he was not unable to execute the trusts, "or how otherwise." The defendant, in his answer, imputed to the plaintiff's solicitor needless delay in effecting a proposed compromise, his inducement being to favor another solicitor, his personal friend:—
Held, that the statement was not scandalous. *Ib.*

See HUSBAND AND WIFE.

POLICY.

Of Assurance.]

See WILL.

POWER.

Of Appointment.] A having, under a settlement, a general power of appointment

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either by deed or will, appointed by several successive deeds, in each deed revoking former appointments, and reserving powers of revocation and new appointment by deed only. By a deed poll she afterwards revoked the last deed of appointment. By her will she made a devise, purporting to be in exercise of her original power of appointment:—

Held, that after the execution of the first deed of appointment the original power was gone, and therefore that the will of A was inoperative. *Evans v. Saunders*, 314.

PRACTICE.

1. *Trustee Act*.] Where some only of the parties interested, presented a petition under the Trustee Act, 1850, the court held that it could make the order under the 51st section of the Chancery Practice Amendment Act. *Sharpley's Trust, in re*, 27.
2. *Dismissal of Bill — Costs*.] In a case in which, after the bill was filed, two of the defendants, having parted with their interest in the subject-matter of the suit to two co-defendants, without acquainting the plaintiffs therewith, joined in an answer disclaiming and claiming to be dismissed with costs, and the plaintiffs then amended their bill, omitting the names of the two disclaiming defendants, and afterwards served them with a notice of motion to dismiss the bill without costs, an order was made pursuant to the notice of motion. *Hawkins v. Gardiner*, 84.
3. *Filing Answer*.] An answer may be filed, notwithstanding the heading does not contain all the usual words. *Rabbeth v. Squire*, 36.
4. *Taking Evidence*.] Under special circumstances, the court will appoint an examiner to take the evidence of witnesses in London. *Brennan v. Preston*, 38.
5. On petition for re-investment of purchase-money paid into court, and arising from settled lands bought under legislative powers, the court, in the first instance, only approves of the propriety of the proposed investment, and reserves the directions as to the completion of the purchase until the certificate of a conveyancing counsel is obtained, approving of the title. *Martin's Estate, in re*, 54.
6. *Stay of Proceedings*.] Where there has been a final decree in a suit in India, upon motion by the defendant in a similar suit in England, between the same parties and for the same purpose, the court in England will make an order staying all proceedings in the English suit, without prejudice to any proceedings which the plaintiff may be advised to adopt with reference to the decree and proceedings in India. *Ostelt v. Lepage*, 57.
7. *Administrator*.] An administrator *de bonis non*, &c., in India, appointed by the authority of the plaintiff, administrator in England, is substantially the same party for this purpose. *Ib*.
8. Such administrator in India is authorized to assent to a compromise, under the authority of the court in India, and a decree adopting that compromise is a final decree. *Ib*.
9. After such decree the plaintiff in England cannot, by supplemental bill or amendment under the new practice, continue the English suit, in order to obtain discovery of facts which would enable him to set aside the decree in India. *Ib*.
10. *Amendment of Petition*.] A petition, praying the payment out of court, under the Trustee Relief Act, of a small sum to the petitioners, in certain shares, to which they were held not entitled on the true construction of a will, was allowed to be amended by the addition of a prayer for a declaration of the rights of all parties, and payment accordingly; and, subject to such amendment, an order was made containing such a declaration, and for payment in conformity therewith. Costs of all parties out of the fund. *Walker's Trusts, in re*, 61.
11. *Reference to Counsel*.] No special or substantive order will be made in ordinary cases for a reference to conveyancing counsel under the 40th section of the 15 & 16 Vict. c. 80, but the court will adjourn the case, in order that the opinion of counsel may be taken in the mean time. Form of order under such a reference. *Harvey v. Brooke*, 64.

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12. *Infant's Suit.*] In an infant's case, where money is to be paid into court, two orders are necessary — one for the payment of the money, and a second for the execution of the conveyance, reciting the first order. *Ib.*
13. *Right to Begin.*] Upon an appeal from the whole order made on a "claim," the plaintiff begins. *Neathway v. Reed*, 150.
14. *Swearing of Answer.*] Where the jurat of one defendant to a joint and several answer has been accidentally cancelled, the answer must be resworn by such defendant; but the jurat is to be in the old form, namely, as to the truth of the matters stated which are within the knowledge of the defendant, and as to his belief of the truth of the other matters not within his own knowledge. *Attorney-General v. Henderson*, 157.
15. Under the Masters in Chancery Abolition Act, the court cannot act on the opinion of the conveyancing counsel, in the case of an exchange. *Thornhill v. Thornhill*, 224.
16. *Change of Solicitor.*] Upon the decease of the solicitor employed by a party to a suit, proceedings taken by a new solicitor employed by him are regular, although the change of solicitor is not authorized by any special order of the court. *Whalley v. Whalley*, 230.
17. *Contempt — Service.*] Notice of motion for an order, under the 12th rule of stat. 11, Geo. 4, and 1 Will. 4, c. 36, for the defendant to remain in custody, until an answer or further order should be served upon the defendant. *Aveling v. Martin*, 261.
18. *Supplement.*] After decree in the original cause, upon a defect of parties, an accounting defendant filed a supplemental bill to bring necessary (new) parties before the court. On a motion by the original plaintiff to take this supplemental bill off the file for irregularity: —
Held, that after a decree any accounting defendant has a right to file such a bill, to enable the decree to be duly carried out. *Lee v. Lee*, 265.
19. *Change of Agent.*] Where a London agent was employed by a country solicitor under a special agreement, an order of course, obtained by the country solicitor to change the agent without disclosing the agreement, was discharged, with costs, for irregularity. *Richards v. Scarborough Market Co.* 269.
20. *Parties.*] An act for the improvement of equity jurisdiction does not enable the court to proceed in the absence of all claimants on one side, but only at the discretion of the court in the absence of some of the claimants on one side. *Swallow v. Binns*, 270.
21. *Suit by Next Friend.*] A married woman cannot institute a suit in *formâ pauperis* without the intervention of a next friend. *Page, in re*, 309.
22. *Foreclosure Claim.*] In a foreclosure claim, the defendants appeared to the claim, but, though duly summoned, did not appear at the hearing. The plaintiff asked for an immediate sale. The court declined to direct an immediate sale, but ordered that an account should be taken, and that, in default of payment within a short period, the property should be sold. *Smith v. Robinson*, 450.
23. *Solicitor's Costs.*] A trustee is not a proper party to a petition presented by a *cestui que trust* for the delivery and taxation of bills of costs paid by a trustee. *Mole, in re*, 454.
24. *Service of Notice.*] Where an appearance has been entered by the plaintiff for the defendant who has absconded, notice of the filing of the replication under the Chancery Procedure Amendment Act, and the 28th of the General Orders of August, 1852, is to be left at the last known place of abode of the defendant, and to be advertised in the Gazette and in two county papers. *Barton v. Whitcomb*, 491.
25. *Absent Parties.*] In an administration suit by a single plaintiff, where an inquiry was directed in the decree as to the persons entitled to the residue, and the Master made a report finding a great number of persons — nephews and nieces, and descendants of nephews and nieces — answering the descriptions in the testator's will,

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and consisting in part of married women and infants, and persons out of the jurisdiction, the court declared the rights of the parties, without a supplemental bill being filed to bring them before the court. *Williamson v. Parker*, 519.

See COSTS. EXECUTORS. NE EXEAT.

PRESUMPTIONS.

The court will not presume that a married woman, aged forty-nine, is past childbearing. *Overhill's Trusts, in re*, 328.

PRINCIPAL AND SURETY.

Liability of.] A surety, in answer to a letter informing him that proceedings were contemplated against him and his principal, stated, through his solicitor, that he would in a post or two pay the amount and interest due on the joint security. The surety died, and the creditor sued the administratrix of the surety, and it was held at the Rolls that the letter was a promise to pay, for which the forbearance to sue was a sufficient consideration: but on appeal:—
Held, that the surety had neither in law nor in equity, rendered himself severally liable. *Jones v. Beach*, 427.

PRINCIPAL AND AGENT.

• See EVIDENCE.

PRIORITY.

Of Debt for Rent.]

See LANDLORD AND TENANT.

PROBATE.

In Scotland.] A Scotch probate is not recognized by the Court of Chancery in England. *McDonald v. Bryce*, 305.

PROBATE ACCOUNTS.

See COSTS.

PRODUCTION OF DOCUMENTS.

1. *Title Deeds.*] In a suit for redemption, by a mortgagor, against the transferee of the mortgage only, the plaintiff confessing the defendant's title, but stating that he was unable to discover, and seeking discovery by what means the defendant made it out:—

Held, that the defendant was not bound to produce the deed of transfer to him, which his answer admitted to be in his possession, and to be relevant to the matters in question, on the ground that it was privileged as the defendant's title deed. *Lewis v. Davies*, 228.

2. *Co-defendant.*] Under an order that one of the defendants should allow the plaintiffs, their solicitors or agents, to inspect certain documents, it was held that the defendant was justified in refusing to allow the inspection to take place in the presence of a co-defendant, although employed as an agent of the plaintiffs. *Bartley v. Bartley*, 329.

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3. *Documents not in Custody of Defendant.*] Upon a bill filed against three directors, who were also treasurers and trustees of a public company, the defendants were required to produce documents which, by their answer, they stated to be at the office of the company, but not otherwise in their possession, custody, or power. The defendants, previously to the motion for production, had ceased to be treasurers and trustees :—
Held, that the defendants could not be compelled to produce documents which were not in their exclusive possession, but only in the possession jointly with the other directors of the company. *Penny v. Goode*, 361.

4. *Pedigree.*] The question in the suit being whether, upon the construction of certain words in a will, an estate tail or an estate in fee was limited, it became necessary for the plaintiff to prove his pedigree. The plaintiff moved for production of documents in the defendant's possession, consisting of deeds showing the precise nature and extent of the property; copies of pedigrees furnished to counsel to defend an action of ejectment brought against the defendant by the plaintiff; extracts from parish registries of births, deaths, and marriages; and a pedigree from the *Heralds' College*, procured by the defendant for his defence to the action :—
Held, that the extracts from parish registries and the pedigree from the *Heralds' College* must be produced, but none of the other documents required. *Wright v. Vernon*, 440.

PROMISSORY NOTE.

Property.] A promissory note due to a testator domiciled in England, by a person resident at the Cape, passes by the words "property I shall leave in the Colony."
Scorey v. Harrison, 46.

RAILWAYS.

Payment for Lands.] Lands having been taken for the purposes of a railway company, and the money paid into court, and other lands being approved of, to be purchased therewith, and to be settled to the like uses as the former lands :—
Held, that only one application to the court would be necessary for carrying this purpose into effect; and that the draft conveyance, approved by the conveyancing counsel, being engrossed, with a blank for the date, and other particulars of the order, the court would make one order directing the blank to be filled up, and the contract to be completed. *Caddick's Estate*, 82.

See BANKRUPT. CONTRIBUTORY.

RECITALS.

In a Deed.]

See EVIDENCE.

REGISTRATION.

See COPYRIGHT. SPECIFIC PERFORMANCE.

SALE.

See VENDOR AND PURCHASER.

SEPARATION DEED.

See HUSBAND AND WIFE.

Chancery.

SETTLEMENT.

1. *Trust.*] By settlement, personal estate was limited, after the death of the husband and wife, in trust for all the children as tenants in common, and the several issue of the body of such children; and failing issue of any such children, their shares to the use of the surviving children, as tenants in common, and the issue of their bodies. There was a gift over, in case there should be no issue of the marriage, or any issue of such issue, or, being such, all should die before their shares should become payable:—

Held, that the children of the marriage took absolute interests, and that the representatives of a child who died an infant, without issue, in the life of his parents, were entitled to a share. *Mount v. Mount*, 498.

2. *Wife's Equity.*] A married woman, whose husband was a bankrupt, became entitled to a fund under 200*l*. There was an affidavit of no settlement upon the marriage, and that the wife had no other fund out of which to maintain herself or her children:—

Held, that the smallness of the amount did not prevent the wife's right to a settlement, and that the special circumstances were sufficient to induce the court to settle the whole fund upon her and her children; the husband's assignees being excluded from any share. *Kincaid's Trust, in re*, 396.

See BURDEN OF PROOF.

SHARES.

Bequest of.]

See WILL.

SHAREHOLDER.

Rights of.]

See BANK.

SPECIFIC PERFORMANCE.

1. *Stamp.*] Contract to sell a freehold ground-rent of 20*l*., arising from a wharf, "subject to an agreement for a lease for a term" of years. The agreement mentioned was unstamped. On a bill for specific performance by the purchaser:—

Held, that the agreement was part of the subject of the contract, and that the vendor was bound to perfect it by having it properly stamped. *Smith v. Wyley*, 49.

2. *Registration of Judgment.*] If a judgment be not re-registered within five years after its first registration, as against a purchaser with notice of re-registration made a little more than five years after the original registration, but less than five years before the execution of the conveyance to him, it is void under the provisions of the statute 2 & 3 Vict. c. 11, s. 4. *Freer v. Hesse*, 154.

3. *Satisfied Term.*] A satisfied term, assigned in trust for a purchaser for value, without notice of a judgment before the 31st December, 1845, although extinguished on that day by the 8 & 9 Vict. c. 112, is, by the 1st section of that act, a protection to a subsequent purchaser from him, without any fresh declaration of trust or assignment in favor of such subsequent purchaser. *Id.*

4. *Compensation.*] A defect in the title to a small piece of land, over which lay the approach to a house and other land, the main subject of a purchase, was a matter for compensation, where the contract contained a condition for compensation, if any mistake or omission should be discovered in the description of the property. In a suit for specific performance, by a vendor against a purchaser, the Master reported that a good title was first shown, pending the reference to him, except as to a small

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portion, which the court considered a subject of compensation. Costs were given to the defendant up to the date of amending the bill, and to the plaintiff afterwards. *Ib.*

5. *Time not the Essence of a Contract.*] An estate was put up to sale by auction on the 22d of July. By the conditions of sale an abstract of title was to be furnished within seven days from the day of sale on the application of the purchaser for the same; all objections were to be taken within eight days of such delivery, or to be considered as waived; the purchase to be completed on the 8th of August. The purchaser's solicitor called for the abstract on the 24th day of July, two days after the sale. The estate was in mortgage, and the mortgagees being abroad, the abstract could not be made in time, but the same was delivered on the 3d of August. The purchaser, thereupon, claimed to rescind the contract, and brought an action for the deposit. The vendor filed a bill for specific performance, to which the purchaser put in a demurrer:—

Held, affirming a decree at the Rolls, overruling the demurrer, that time in the delivery of the abstract was not the essence of the contract. *Roberts v. Berry*, 400.

6. *Doubtful Title.*] On a vendor's bill for specific performance, the opinion of the court was much in favor of the title, the question on which turned on the construction of a particular will; but the court, being unable to found that opinion upon any general rule of law, or upon reasoning so conclusive as to satisfy the court that other competent persons might not entertain a different opinion, or that the purchaser taking the title might not be exposed to substantial and not merely idle litigation, refused to decree a specific performance. *Pyrke v. Waddingham*, 534.

7. A doubtful title, which a purchaser will not be compelled to accept, is not only a title upon which the court entertains doubts, but includes also a title which, although the court has a favorable opinion of it, yet may reasonably and fairly be questioned in the opinion of other competent persons; for the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion in favor of the title should turn out not to be well founded. *Ib.*

8. If the doubts, as to a title, arise upon a question connected with the general law, the court is to judge whether the general law on the point is or is not settled; and if it be not, or if the doubt as to the title may be affected by extrinsic circumstances, which neither the purchaser nor the court can satisfactorily investigate, specific performance will be refused. *Ib.*

9. The rule rests upon the principle, that every purchaser is entitled to require a marketable title. *Ib.*

10. It is the duty of the court, on questions of title depending on the possibility of future rights arising, to consider the course which would be taken if the rights had actually arisen, and were in course of litigation. *Ib.*

11. *Abandonment of Contract.*] A railway company, having contracted with a party, who, under a contract made some years previously, was a purchaser of land which the company required for a railway, but who had not paid his purchase-money, and appeared for some time to have abandoned the possession of the land, filed their bill for specific performance against both the vendor and purchaser:—

Held, that, as the purchaser was not, after the lapse of time and under the circumstances, entitled in equity to a decree for specific performance of the contract against the vendor, the bill must be dismissed as against him, with costs; and as against the purchaser, without costs. *South-Eastern Railway Co. v. Knott*, 555.

12. The rights of parties to agreements to enforce a specific performance in equity are not co-extensive; for their respective rights depend upon their conduct, and the conduct of one may give him the right to apply to the court, while the conduct of the other may debar him from that right. *Ib.*

See FRAUDS, STATUTE OF. VENDOR AND PURCHASER.

STAMPING.

See SPECIFIC PERFORMANCE.

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STATUTES CITED, EXPOUNDED, &c.

9 Geo. 2, c. 36,	109
2 & 3 Vict. c. 11,	156
2 & 3 Vict. c. 54,	77
10 & 11 Vict. c. 96,	9
12 & 13 Vict. c. 74,	9
13 & 14 Vict. c. 60,	52
14 & 15 Vict. c. 60, s. 37,	27
15 & 16 Vict. c. 86, ss. 28, 35, 40, 41,	101
15 & 16 Vict. c. 86, s. 48,	38
15 & 16 Vict. c. 86, s. 51,	27

SUBPOENA.

1. *Ad Testificandum.*] A subpoena *ad testificandum* issues *ex debito justitiæ* without the order of the court, and it is not necessary to obtain such an order beforehand, where there is a probability that the *viva voce* evidence of a party may be required at the hearing in the case, contemplated by the 39th section. *May v. Biggenden*, 225.
2. *Semble*, that if the court wishes to have the *viva voce* evidence of a party under that section, the course would be, if he were not present, to adjourn the hearing. *Id.*

THELLUSSON ACT.

Portions.] A, the mother of B, by her will, directed trustees to invest 50,000*l.*, and to pay a competent part of the income for the benefit of B, for his life, and to invest the surplus of the income, to the intent that it might accumulate for the benefit of the persons who, under the will, should be entitled to it; and after the death of B, to apply the said sum and accumulations, or a competent part, for the children of B, during their minorities, or until their portions should become payable, and, when the children should attain twenty-one, to divide the said sum and accumulations among such children equally. A died in 1831. B was living:—
Held, that the trust for accumulation came within the exception to the 2d section of the Thellusson Act, and was not void. *Middleton v. Losh*, 423.

See WILL.

TIME.

Not the Essence of a Contract.]

See SPECIFIC PERFORMANCE.

TRADE MARKS.

1. *Injunction — Acquiescence.*] Where plaintiffs had asked and obtained a decree for an injunction to restrain a defendant from using one of twelve trade marks, which they stated were all their peculiar marks, all such marks being a common name, with various additions; and the defendant, after the decree, had entered into a partnership bearing that name, which was the principal part of the prohibited mark, and that partnership used the prohibited mark for five years without interruption by the plaintiffs; although this was a violation by the defendant of the letter of the decree, yet, considering all the circumstances, and particularly the acquiescence by the plaintiffs, and their own low estimation of the value of the right protected, and that they had not proceeded against the defendant's alleged partners, the court refused a motion to commit the defendant for breach of the injunction, but without costs. *Rodgers v. Nowill*, 83. [But see below.]

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2. *Injunction — Breach.*] Acquiescence on the part of the plaintiffs who have obtained an injunction restraining the use of a trade mark, in order to constitute a valid defence to a motion by them to commit for breach of the injunction, must be such as to amount almost to a license by them to the defendants to use the trade mark. *Ib.* 145.
3. *Injunction.*] Where the manufacturer of an article of trade sells it under his own name, and the article attains great celebrity in the market under that name, the manufacturer does not thereby acquire such an exclusive right in the use of the name or title under which the article has been sold as to prevent the use of it, without fraud, by another person having the same name, in the sale of a similar article manufactured by himself. *Burgess v. Burgess*, 257.

TRUSTS.

1. *Marriage Settlement.*] By a marriage settlement a fund was settled, as to one moiety, for the benefit of the children after the death of the parents; and as to the other moiety, after the death of the wife, if she died in the lifetime of the husband, to such uses as she should appoint, and in default of appointment, to such persons as would have been entitled to the residue of her personal estate, if she had died intestate and without being married. The wife died in the lifetime of the husband, leaving two children:—
Held, that the children were not entitled to the second moiety. *Norman's Trust*, 127.
2. *Declaration of Trust, not Revocable.*] P., being indebted to J. in a sum of 300*l.* to be repaid by instalments, drew up, but did not sign, a memorandum, which was signed by J., by which J. directed the instalments to be invested as therein mentioned, and the dividends to be paid, after the decease of J., to and among the children of P. M. and E. his wife; and when the youngest attained the age of twenty-one years, then the whole fund was to be divided among such children. If any child died before the youngest attained twenty-one years, his share was to go to the survivors in the same manner. This memorandum was never made known to the parties interested, but only to P. and J. Afterwards J. executed another memorandum, in effect revoking the direction in the first memorandum for investing the instalments and directing payment of the instalments to herself:—
Held, that the first instrument amounted to a full and complete declaration of trust, and was, therefore, not revocable. *Paterson v. Murphy*, 287.
3. *Payments.*] P., the trustee, had paid several instalments to the testatrix after the date of the second memorandum:—
Held, that the *cestuis que trust* under the first memorandum could not recover these payments in the present suit, which was a suit by P., the executor, for the administration of the estate of J. *Ib.*
4. *Contract — Partnership.*] A tradesman bequeathed his residuary estate, including his stock in trade, to trustees, with a direction to convert into money all such parts as should not consist of leaseholds or money in the funds; and to invest the same and pay the annual income to Sarah his wife; and after her decease, to Mary, his wife's sister; and after the decease of the survivor of Sarah and Mary, he gave his residuary estate to another person absolutely. After the date of the will, Mary married, and her husband and the testator entered into partnership, under articles which contained a proviso, that if the testator should die during the partnership, leaving a widow surviving, such widow might, if she should think fit, continue to carry on the partnership business with the surviving partner, and should be entitled to the testator's share in the profits and excess of capital; and if the testator should leave no widow, or his widow should not desire to enter into the business, or if the other partner should die during the partnership, the surviving partner to take upon himself the partnership business and property, accounting and paying for the same as therein directed. The testator died, leaving his widow, who, under this provision claimed his interest in the partnership:—
Held, that the provision in the articles took the testator's share of the business wholly out of the provisions of the will, and that the widow became entitled, under the partnership articles, to such share. *Page v. Cox*, 572.

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5. A trust may well be created in the absence of any expression importing confidence; and the obligation on the surviving partner created by the partnership articles, with reference to the legal interest in the partnership, did not in substance differ from a trust, and therefore the articles of partnership created a trust in favor of the wife, to arise on the death of the testator leaving a widow surviving, which would attach on the property as it should then exist. *Ib.*
6. *Secret Trust.*] A devise and bequest of the testator's residuary estate to two persons, with an oral intimation given by the testator to one (if not both) of the devisees, that he had confidence in them, and was satisfied they would carry out his intentions, which they well knew, and an assent by one of the devisees to this intimation:—
Held, to be an undertaking by the devisee that he would carry out the intention, and to be therefore a gift upon a secret trust. And it appearing that the trust was for the foundation of a Socialist school, and either charitable or illegal, the court declared it void as to the real estate, mortgages, and chattels real, and directed an inquiry into the nature of the trust contemplated. *Russell v. Jackson*, 587.
7. Where it appeared that the gift was made upon the assent and consequent undertaking of one only of the devisees in trust to perform the illegal or void trust, the other devisee could not take the estate beneficially. *Ib.*
8. In such a case, if the extent of the property intended by the testator to be subjected to the secret trust be uncertain, it lies with the trustee who has taken the estate by means of his assent to the testator's design, to show to what part of the property the trust does not extend. *Ib.*

TRUSTEE.

1. *Trustee Relief Act.*] A party purchasing an estate, expressly subject to the payment of legacies charged thereon by will, is not a trustee within the meaning of the Trustee Relief Act, and having paid the money into court under that act, and presented a petition for its investment, or for repayment to the petitioners, the court directed the money to be paid out to the petitioners, and ordered the petitioners to pay the respondents' costs. *Buckley's Trust, in re*, 9.
2. *Marriage Settlement.*] By a marriage settlement the trusts of a fund were declared to be as to one moiety for the benefit of the children, after the death of the parents; and as to the other moiety after the death of the wife, if she died in the lifetime of the husband, as the wife should appoint, and in default of appointment for such persons as at the death of the wife would have been entitled to the residue of her personal estate, "in case she had died intestate and without being married." The wife died in her husband's lifetime, leaving two children:—
Held, that the children were entitled to the second moiety. *Norman's Trust, in re*, 39.
3. *Act of 1850, s. 30.*] The court is not authorized, by the Trustee Act, s. 30, to add to the order of course to make a foreclosure decree absolute, a declaration that the mortgagor, being out of the jurisdiction, is a trustee for the mortgagee, although the former order nisi was, that he should convey to the mortgagee, the mortgage being equitable. *Smith v. Boucher*, 63.
4. *Breach of Trusts.*] In 1826, a debt due from a firm at Calcutta, was assigned to trustees in England, in trust to call in and invest on Indian securities, and accumulate. The debtors became bankrupts in 1830, and the trustees not having, in the mean time, taken proper steps to call in the money, a considerable portion of the debt was lost:—
Held, that they were liable for the breach of trust, and ought to make good the accumulation which would have been produced; secondly, that one of the trustees who had been abroad with his regiment during that period, was equally liable; but, thirdly, that they were to be excused during such a reasonable time as was necessary in order to communicate between England and India.
 Generally, where trustees are guilty of a breach of trust, they must pay the costs of a suit to repair it. *Byrne v. Norcott*, 495.

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UNCERTAINTY.

In Will.]

See WILL.

UNDUE INFLUENCE.

See ANNUITY.

VENDOR AND PURCHASER.

1. *Contract by Letters.]* A party directed his agent to buy a lease of a house for 3,200*l.*, and sign an agreement. The agent wrote to the agent of the owner, offering 3,200*l.* The owner wrote across the last-mentioned letter, "I agree to sell my house upon these terms;" and thereupon the agent of the owner wrote to the agent of the other party, "my employer will take your offer;" and added, "make an appointment to meet to draw the agreements." The day following, the agent of the purchaser said that his employer had closed on another house:—

Held, that the letters constituted a contract to buy, and specific performance was decreed, with costs. *Cowley v. Watts*, 147.

2. *Auction.]* A and his agent attended an auction for the sale of a house, at which certain conditions of sale were exhibited, and with which they became acquainted. A afterwards, through his agent and the agent of the vendor, purchased the same house:—

Held, that the particulars of sale were not incorporated with the purchase, and therefore not binding on the purchaser. *Id.*

See LIEN. SPECIFIC PERFORMANCE.

VESTED.

Meaning of that Word in a Will.]

See WILL.

VICE-CHANCELLOR.

Semle, the Vice-Chancellors have jurisdiction to hear petitions and make orders for the appointment of new trustees of municipal charities. *Northampton Charities, in re*, 82.

WIFE.

Bequest to Wife, Means Lawful Wife.]

See WILL.

WILL.

1. *Construction — Inheritance.]* A testator, by his will, gave all his freehold and copyhold hereditaments in the county of D., "which had or might thereafter come into his possession by inheritance from his late father;" to trustees for a term of 500 years, upon trust, to provide for the payment, among other things, of an annuity of 3,000*l.* to his wife. Part of the testator's estates in the county of D. were conveyed to him by his father by deed of gift, and he entered into possession of them in his father's lifetime. Other parts of the testator's estates in the county of D. were devised to him by his father's will, he being his father's heir at law. The latter estate was insufficient to provide for the sums charged upon it:—

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Held, that the estates acquired by the testator, by the deed of gift, did not pass by the devise to the trustees. *Wilkinson v. Bewicke*, 3.

2. *Meaning of "Vested."*] A testator gave all his real property to his sons, in equal shares, as tenants in common, to be vested in them, as to one moiety, when each son should attain the age of twenty-one, and as to the other when the youngest son for the time being should attain twenty-one; and in case any of them should die before his respective moieties became vested, he gave the unvested share, which should belong to such son, to his other sons. And he directed the guardians appointed by the will, to receive the rents of the shares during the minority of his sons, and apply the whole or any part to their respective educations:—

Held, that "vested" must be taken to mean "not liable to be divested," or "vested indefeasibly." *Poole v. Bott*, 13.

3. *Bonds against Marrying.*] The testator directed the trustees not to pay over the shares of the sons, or permit them to enter upon the real estate, until they had given bonds not to marry or illegally cohabit with the daughters of a person named. The court declined, on the application of a party having a remote interest, to direct such bonds to be given. *Ib.*

4. *Heirs of Body.*] Where personalty is given by will to a person, and in the event of that person's death to "the heirs of her body," all the children of the party are entitled to take equally. *Pattenden v. Hobson*, 16.

5. *Bequest of Shares.*] A shareholder in an unincorporated insurance company, by whose rules every holder of shares was required to effect an insurance with the company, by his will gave to A and B "all and every of his shares and interest in the company, and all the advantages to be derived therefrom." The words "shares and interest," were also, in other parts of the will, used with reference to companies of different kinds:—

Held, that the policy of assurance effected by the testator with the company, did not pass under the bequest. *Harrington v. Moffat*, 22.

6. *Annuity — Restraint of Marriage.*] A bequest of an annuity to a single woman during the term of her natural life, "if she shall so long remain sole and unmarried":—

Held, to be a limitation as distinguished from a condition, and that the annuity ceased upon the marriage of the legatee. *Heath v. Lewis*, 41.

7. *Remoteness.*] By indenture of marriage settlement, lands were settled to J. J. R. for life; remainder to trustees for securing a jointure and certain portions; remainder, in default of issue male of J. J. R. in that marriage, to J. J. R. in fee. By will, dated 1816, J. J. R. devised all the said hereditaments, "in the event of his death without leaving issue by his said wife," to his wife for life; remainder to P. R. for life; remainder to trustees, to sell, and pay to E., (the petitioner,) 4,000*l.*, at twenty-one, or marriage, "and to be a vested interest then, though payment might not be possible till after the deaths of his wife and P. R.; and to pay and divide the residue among such of the other children of P. R. as should be living at his decease, or, then dead, leaving issue, the issue of any such dead child to take the parent's share:—

Held, that the gift over, in the event of the testator's death without leaving issue, was not void for remoteness. *Rye's Settlement, in re*, 43.

8. *Failure of Issue.*] Where the ulterior limitations in a testator's will depend on his death without leaving issue, and among those ulterior limitations there are provisions which cannot refer to a general failure of issue, then the failure will be taken to be a failure of issue living at the death of the testator, and not a general failure of issue. *Ib.*

9. *Distribution — Per Capita.*] Gift of personalty, to be equally divided between J. and A. for the period of their natural lives, after which to be equally divided between their children:—

Held, that on the death of A., J. was entitled to a life-interest in one moiety, the remainder to be divided between the children of J. and A. *per capita*. *Abrey v. Newman*, 125.

10. Declaration made in a suit in the absence of parties interested. *Ib.*

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11. *Nearest of Kin.*] S., the testator, by his will, gave personalty to be accumulated for twenty-one years, and then to be paid to "my then nearest of kin in the male line, in preference to the female line; . . . the inheritor of my said capital property to bear and use the arms, with due differences, which may at any time previous to my decease have been granted to me; . . . the party not to be put into possession till twenty-one years of age." The testator died a bachelor, leaving two brothers, who both died bachelors; three sisters, who died spinsters; and three other sisters, who were married. Of all these, only one sister, and no brother, survived the period of twenty-one years. Two of the married sisters had sons, who survived. The testator had a cousin, a son of a paternal uncle:—
Held, as between these three parties—namely, the sole surviving sister, the sons of sisters, (the nearest male relatives of the testator,) and the cousin—and the next of kin claiming for uncertainty, that the surviving sister was entitled. *Boys v. Bradley*, 132.
12. The court will not, except as the very last resource, decide in favor of an intestacy for uncertainty. *Ib.*
13. "Male line," when a testator dies without children, held equivalent to "*ex parte paternâ*." *Ib.*
14. Inheritor, heir, party, &c., are nouns of number, and do not exclude females, nor a plurality of takers. *Ib.*
15. *Uncertainty of Description.*] Gift to "V. B., the son of my uncle, P. B." There was no such person as V. B., but there was a G. V. B., commonly called by the testator V. B. But G. V. B. was not the son of P. B., but of another uncle of the testator. P. B. had two sons, neither of whom was called V. One of such sons had been many years abroad, and the other was hardly at all known to the testator. G. V. B. was on intimate terms with the testator:—
Held, that G. V. B. was entitled. *Bernasconi v. Atkinson*, 103.
16. The court will not adopt an intestacy for uncertainty except in the very last resort. *Ib.*
17. *Extrinsic Evidence.*] Extrinsic evidence is only admitted to assist in the construction of wills where the ambiguity is created by matter *dehors* the will. *Ib.*
18. *Construction.*] A testator will always be held to have used the very description in his will, notwithstanding it may, in fact, be the description rather of his legal adviser than his own. *Ib.*
19. *Settlement—Estate Tail.*] Devise in trust for the testator's daughters, M. and C., for their lives, for their separate use; and in case both M. and C. should die without leaving issue, then over implied estates tail to M. and C., with cross remainders in tail.
M. died unmarried; and then C., conceiving herself tenant in fee simple, in contemplation of marriage, conveyed her estate, with the concurrence of her intended husband, by lease and release to trustees and their heirs, in trust for herself until the marriage, and after the solemnization thereof, in trust for herself for life, and then for her children, &c. There was issue of the marriage:—
Held, that the trustees took a base fee, and that the husband was not tenant by the curtesy. *Stanhouse v. Gaskell*, 140.
20. *Held*, also, that after C.'s death, her eldest son, having elected to take against the settlement, and barred the entail, could make a good title to a purchaser from him, and such as a court of equity would compel the purchaser to accept. *Ib.*
21. *Surviving Children.*] A testatrix, by her will, bequeathed "to my sister C. N.'s surviving children 30*l.* each," and subsequently proceeded as follows:—"I give and bequeathe unto my sister, C. N., the interest of my funded property, for and during her natural life, and after her decease such property to be equally divided between her surviving children." One of C. N.'s children, who survived the testatrix, died in C. N.'s lifetime:—
Held, that "surviving children," in the second gift, meant children surviving C. N., although in the first gift it meant surviving the testatrix. *Neathway v. Reed*, 150.

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22. *Accumulations — Thellusson Act.*] By a marriage settlement of 1823, family estates at B., of which Lord B. was tenant for life in remainder, were charged with a sum varying from 20,000*l.* to 40,000*l.*, according to the number of younger children of Lord B., for their portions, which portions were to be divided and payable among the younger children as Lord B. should by deed or will appoint; and in default of appointment, equally to be divided among them, and payable at the decease of Lord B., with a power in Lord B. of advancing any child's portion in his lifetime. The Bishop of D., the great uncle of Lord B., by his will, dated in 1825, reciting the settlement of 1823, bequeathed 15,000*l.* to trustees, upon trust to accumulate the same during the lifetime of Lord B., or if he should die within the term of twenty years from the decease of the testator, for such further period as should make up the full term of twenty years from the decease of the testator; and upon completion of the accumulation, to apply the same, or a competent part thereof, in discharge of the said portions, when and as the same respectively shall become payable, and in exoneration of the hereditaments charged therewith; with a proviso, "that if, before the expiration of the period for accumulation, the accumulated fund should be of sufficient amount for the purposes aforesaid, then the accumulation shall thereupon immediately cease." The testator also gave certain chattels to go as heir-looms with the settled estates, and bequeathed 30,000*l.* for building a mansion-house upon the same. The testator died in 1826. The number of Lord B.'s younger children were such that 40,000*l.* would be raisable under the marriage settlement. In 1847, twenty-one years after the testator's death, the accumulated fund amounted to 35,622*l.*; at the time of the institution of this suit it amounted to 43,643*l.* Lord B. was still living, and had only appointed a small sum, by way of advancement, to one of his younger children:—

Held, first, upon the construction of the will, that the proviso as to the cesser of accumulation applied to the period of Lord B.'s lifetime, as well as to the twenty years from the testator's death. *Barrington v. Liddell*, 188.

23. *Portions for Children.*] Secondly, assuming this case to be within the 1st section of the Thellusson Act, 39 & 40 Geo. 3, c. 98, (reversing the decision below,) that the sum accumulated within the twenty-one years, was, so soon as the 40,000*l.* was accumulated, a fund applicable to the payment of any of the younger children's portions which were then payable, and would be applicable to the rest of the portions when they should become payable; and that the latter part of the 1st section would be satisfied by giving the residuary legatees the difference between the 35,622*l.* and the 40,000*l.*, which was the limit of accumulation. *Ib.*

24. *Valid Accumulation.*] Thirdly, (reversing the decision below,) that this was a case within the exception in the 2d section of the act, it being a provision for raising portions for children of a person taking an interest under the devise; and that the whole accumulation direct was valid. *Ib.*

25. *Interest of Parent.*] *Semble*, *contra* the dicta of the court below — First, that the exception in the 2d section, as to accumulation for payment of debts, is not confined to the debts of the person directing the accumulation, but extends to a provision for payment of the debts of any person or persons; and it extends to past and future debts. Secondly, that to bring a case within the exception in the 2d section, it is not necessary that the parent of the portioned child should take an interest in the same real or personal estate, the income of which is directed to accumulate. And, *contra Bourne v. Buckton*, 2 Sim. N. S. 101; s. c. 9 Eng. Rep. 152, that it is not necessary that the parent should take an interest under the particular clause directing the accumulations; but that "such devise" means "such will." *Ib.*

26. *Construction.*] A. B. was at the time of her decease possessed of a lease from charity trustees, for forty years, of certain lands held by them for lives, renewable when the *cestuis que vie* were reduced to five. A. B. had in her sublease covenanted to pay the fine on such renewal. By her will, after devising her freehold estate, she bequeathed "all her leasehold at H. or elsewhere, and all her shares in the C. W. Company, and all her stocks, funds, and securities for money, and all other her personal estate and effects," to trustees, upon certain trusts as to each moiety thereof, being for her two nieces for life, with remainder to their children, with cross-remainders over in default of issue. The testatrix gave to her trustees special powers of

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leasing, cutting timber, &c. The testatrix died in September, 1826. In the month of July, 1825, the number of charity trustees had been reduced to five, and the fine therefore became payable; but, in consequence of disputes as to the amount, no trustees were admitted till 1835. In 1850, the number again became reduced to five:—

Held, first, that the fine which became payable in the testatrix's lifetime was payable out of her general personal estate in exoneration of the leaseholds. *Fitzwilliams v. Kelly*, 218.

27. Secondly, that the second fine, which accrued after the testatrix's decease, was not, as between the legatee of the leaseholds and the general personal estate, payable out of the latter, but the legatee took the leaseholds *cum onere*. *Ib.*

28. *Costs.*] The costs of the litigation respecting the amount of the fine, and of the second fine, so far as related to the present application, were directed to be paid out of the general personal estate. *Ib.*

29. *Gift to Cousins.*] A testator gave property, after the failure of prior limitations, "unto my first cousins by my mother's side, and the issue of such of them as may happen to be dead, *per stirpes*, and to their heirs, executors, administrators, and assigns forever, as tenants in common:—"

Held, that the words "and the issue," &c., did not make the class ascertainable in *future*, but that the first cousins *ex parte materna*, living at the testator's death, took vested interests, liable to be divested *pro tanto*, so as to let in all other first cousins born before the period of distribution. *Baldwin v. Rogers*, 248.

30. *Substitution.*] S. S., who died in 1821, by her will bequeathed the interest of all her property, the same being wholly personalty, to F. S. for life; but in case she should die unmarried, then over to A. and B., or to their heirs, as they may deem proper." B died in 1835, leaving a widow and seven children, and having by his will bequeathed the residue of property to two of his sons. F. S. died in 1852, without ever having been married:—

Held, that the words "or to their heirs" were substitutional, and that consequently, as the property was personalty, the next of kin of B. took his share in equal proportions, the words "as they may deem proper" having no operation. *Jacobs v. Jacobs*, 267.

31. *Precatory Trust.*] Gift by will to trustees to sell and invest, and pay the annual income to the testator's widow, during widowhood, "for the maintenance, education, and support of herself and her children;" with the following words—"and I do particularly recommend, desire, and direct my said wife, at her decease, by will or otherwise, to divide or dispose of what money or property she may have saved from the said yearly income among all my children, in equal shares:—"

Held, too indefinite as to the subject-matter to constitute a trust for the children in any savings made by the widow. *Coman v. Harrison*, 290.

32. *Wife and Children.*] Bequest of stock, after the death of the testator's widow, upon trust to pay the dividends to G. for life, and then to his wife for life, and after the decease of the survivor, to divide the capital among the children of G. G. had, from a time previous to the date of the will, up to the death of the testator, been living with a woman who was believed to be his wife, and by whom he had several children. G. was never married; he died after the death of the testator, in the lifetime of the testator's widow:—

Held, that the description in the will applied to a lawful wife and children whom G. might have had after the date of the will, and to no others. *Davenport's Trusts*, *in re*, 293.

33. *Contingent Bequest.*] Bequest of residue unto R. S., the son of P. S., for his sole use and benefit, at twenty-one; failing him, to the next male child of P. S., who should attain that age; and failing male children of P. S., to the seven daughters of A. B., the survivors and survivor of them, in equal proportions, their respective shares to be at their free will and disposal. R. S. died before twenty-one, and P. S., having survived all the daughters of A. B., died in September, 1852, without having had any other male child:—

Held, that the residue belonged to the next of kin of the testator. *McDonald v. Bryce*, 305.

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34. *Illegitimate Children.*] Bequest of stock upon trust to pay the dividends to one for life, and then to divide the capital equally "between all the children of G. and the children of M., the wife of W. B., who should be alive at the respective deaths of the said G. and M." M. was married at the date of the will; she died after the testatrix, without lawful issue, but leaving several illegitimate children, all born before the date of the will, and whom the testatrix believed to be legitimate. The court admitted evidence of all facts in the testatrix's knowledge at the time she made her will; but upon the result of this evidence, there being a possibility that M. might have had legitimate children after the date of the will, and there being nothing on the face of the will to confine the description to the illegitimate children who were in existence at the date of it:—
Held, that the illegitimate children took nothing. *Overhill's Trusts*, in re, 323.
35. *Articles Ejusdem Generis.*] A testator, by his will, gave the residue of his personal estate to A, B and C, to be equally divided by them. By a codicil, he gave A the arrears of rent due to him for his real estate, and the amount of any salary due to him, and also bequeathed to A all his clothes and any other property, goods, and articles belonging to him at the time of his death. By another codicil he revoked the bequest made to B by his will:—
Held, that the gift to A, by the first codicil, was a general one, and that the words "property, goods, and articles" were not to be confined to articles *ejusdem generis* with clothes, and that, consequently, A was entitled to two thirds and C to one third of the residue. *Everall v. Browne*, 369.
36. *Bequest of Money.*] A testator being mortgagee in fee of an estate, bequeathed to trustees "all his money in the funds and on securities," upon certain trusts declared by his will:—
Held, that the legal estate in the mortgaged property did not pass under these words. *Cautley, ex parte*, 390.
37. *Residuary Bequest.*] A testator, after giving legacies to various persons, some of whom were mentioned by name and others described as a class, bequeathed the residue of his property to his several legatees thereinbefore "specially named," exclusive of the objects taking under the trusts for the distribution of blankets:—
Held, that the testator, by excluding certain persons not mentioned by name from his residuary bequest, had sufficiently explained his intention; and that, under the words "specially named," those legatees who were not mentioned *nominatim*, but only described as a class, were entitled to share equally with the other legatees. *Holmes's Trust*, in re, 392.
38. *Remoteness.*] A testator devised freehold and leasehold estates to trustees upon trust to pay the rents to A, for life, and, after her death, to pay the rents for the benefit of A's son Robert, and all and every the other son and sons of A, until he and they should attain their ages of twenty-five years; and, on his and their attaining that age, in trust for the heirs, executors and administrators of Robert, and all the other son or sons of A, as should attain twenty-five; but in case they should all happen to die under twenty-five, then over:—
Held, that the devise to Robert, and the other sons and son of A, gave them an immediate vested interest, and was not void for remoteness. *James v. Wynford*, 444.
39. *Remoteness.*] A testator gave freehold and leasehold estates to trustees upon trust for A, for life, and directed them, after the death of A, to pay the rents, or so much thereof as should be necessary for the maintenance of A's son Robert, and all other sons of A, until he or they should attain twenty-five; and, on his or their attaining twenty-five, upon trust for him and them for their lives, as tenants in common, and, after their decease, in trust for the eldest son of Robert and the eldest of all the sons of A, and the heirs of his and their bodies; and for want and in default of such issue, over:—
Held, that the devise and bequest of the freehold and leasehold estates took effect in favor of Robert and such other sons, and was not void for remoteness; and that there was an estate tail given to the eldest son of Robert and the eldest of the sons of A. *Ib.*
40. *Absolute Interest.*] A testator directed his property to be invested in the funds, 1,000*l.* in each child's name, and 1,000*l.* in his wife's; the interest to be received by

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them for life, and afterwards to their descendants; except his wife's, which was, at her death, to be divided amongst them. By a codicil, he alluded to the funds being increased, and directed the same division and appropriation to be made, except that, as any share should fall in, it was to be added to the others, in case the original holder should have no children:—

Held, that upon the will and codicil taken together, the children were only entitled to the interest of their respective shares for life, and that the share of any child dying without children, would go over. *Bird v. Webster*, 451.

41. *Vested Estates.*] A testator gave all the residue of his real and personal estates to trustees, upon trust to convert and invest his personal estate, and to pay the interest, income, and rents to A for life, and declared that they should, as soon as conveniently might be after the decease of A, convey, pay, assign, transfer, and make over the residuary real estates and the trust moneys and premises unto and among all and every the child and children of A, as and when they should severally and respectively attain their ages of twenty-one years, as tenants in common, and their respective heirs, executors, and administrators; and if there should be but one child, then to such child, his or her heirs, executors, and administrators. A died, leaving three children, two of whom died in their infancy:—

Held, that all three children took vested indefeasible interests in the real and personal estate. *King v. Isaacson*, 455.

42. *Produce of Real Estate.*] A testator, by his will, devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trusts, for sale and conversion into money, and directed them to pay certain legacies, but did not make any residuary bequest. The testator, by an unattested codicil, gave other legacies out of the mixed fund, and appointed A, B, and C his residuary legatees:—

Held, that A, B and C were entitled to the surplus produce of the copyhold estates. *Wilde v. Davies*, 466.

43. *Accumulations.*] A testator devised and bequeathed all his freehold and copyhold estates and his personal estate to trustees, upon trust, out of the income to pay 400*l.* a year for the maintenance of his son D, until his death or recovery from a mental malady, and to accumulate the rest of the money; and directed them, if his son should so recover, to pay him all the accumulations; and, if his son should die without having so recovered, to apply the accumulations as therein mentioned; and appointed A, B, and C his residuary legatees. The son lived more than twenty-one years after the death of his father:—

Held, that the trust for accumulation was void at the end of the twenty-one years from the death of the testator, and that the accumulations arising from the rents after that time belonged to the heir, and not to the residuary legatee. *Id.*

44. *Legacy to Executor.*] A testator gave to E. 200*l.*, and appointed him to be his executor; and declared that, if his (the testator's) son should not recover from his then mental malady, then he gave E. 200*l.* E. did not prove the will:—

Held, that E. was entitled to both legacies. *Id.*

45. *Construction.*] A testator directed his trustees to hold 20,000*l.* bank annuities, and pay the dividends to his son for life, with restrictions on alienation; provided, that if his son should marry with the consent of his trustees, a settlement might be made of the fund, subject to the life-estate, for the benefit of the wife and issue, and subject to the trusts of such settlement; or "in case none shall be declared," he directed that the fund should go to such persons as his son should by will appoint: provided, that, in case his son died unmarried, or having been married, without leaving issue, and without having exercised the power of appointment, the trustees were to hold one moiety of the fund upon the trusts mentioned. The son died without having been married, having by his will appointed 10,000*l.*, part of the fund, to his two brothers:—

Held, reversing the decision of the court below, that the son, in the events which had happened, had a valid power of appointment over the fund. *Sheffield v. Coventry*, 470.

46. *Accumulation.*] A testator, after disposing of parts of his real and personal estate for the benefit of his granddaughter, F. E., for life, and after her death for her children at twenty-one, gave all the residue of his real and personal estate to trustees,

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upon trust, to accumulate the income and transfer one moiety of the corpus and accumulations to the children of F. E., and the other moiety to the children of his nephew, C. W. C., such shares to be transferred to them at their respective ages of twenty-one years. The twenty-one years after the testator's death expired in 1847. Upon a bill filed by F. E., who never had any children:—

Held, that the direction to accumulate beyond the twenty-one years from the testator's death was void under the Thellusson Act: that such accumulations were not within the 2d section of the act; that they were undisposed of; and that, at the expiration of the twenty-one years, the income of the real estate belonged to the testator's heir at law, and the income of the personalty to the testator's next of kin. *Edwards v. Tuck*, 485.

47. *To Trustees.*] By a will, property was given to trustees, to apply the rents, interests, and proceeds for the maintenance of the testator's son Edward, for his life, and not to be paid to any person under an assignment by, or execution against, the son; and after the decease of the son, for the two daughters of the testator, absolutely. By a codicil it was declared, that, in case of assignment by Edward, the trustees should stand possessed of the property upon trust for the daughters of the testator, in the same manner and form as declared by his will in the event of the death of Edward. By another codicil, the testator gave 600*l.* stock to Edward, in addition to what he had left by his will, subject to the same controlling powers and restrictions as were appointed by the will; and he gave a like sum to his son William, subject to the like control, "and to the survivor of them, and in the event of both their deaths" for the benefit of the said daughters:—

Held, that the true construction of the second codicil was, that, in the event of the death of either of the legatees, both the legacies of stock should go to the survivor, and not that on the death of either his legacy should go to the survivor, which would cut down an absolute gift into a life-interest. That, although in one codicil the words, "in the event of the death of Edward," meant *upon* the death of Edward, it did not follow that the words in another codicil, "in the event of both their deaths," meant *upon* both their deaths; for one expression was applied to a life-interest and the other to a capital sum: that the period of survivorship must be referred to the period of distribution, namely, the death of the testator. That, therefore, Edward, having survived the testator, took the legacy of stock absolutely. *More's Trust*, in *re*, 577.

48. The rule, that added legacies are subject to the same conditions as the legacies to which they are added, is not applicable to the case, inasmuch as the application of the rule would alter the terms of the additional gift. And whether the rule applies to any cases except where the original legacy is absolute or defeasible in the party to whom the additional legacy is given — *quære*. *Ib.*

49. The provisions in the Wills Act against the lapse of legacies given to children, renders it necessary for a testator, intending that a legacy to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. *Ib.*

50. *Gift over.*] The testator gave the income of a fund to trustees, in trust, to pay the same to A. B. for life, and after her decease to pay the principal money to her daughters, C. and D., in equal shares; with a gift over to the issue of either of them dying in the lifetime of A. B.; and should either C. or D. die in the lifetime of A. B., without leaving issue, then the whole fund was to go over to the survivor of the two daughters; but in case both of them should die in the lifetime of A. B. without leaving issue, then in trust for W. W. absolutely. The testator died in 1844, leaving A. B. and her daughter D. surviving. C., the other daughter, died in his lifetime, unmarried:—

Held, that, upon the death of A. B. the surviving daughter was entitled to the whole fund. *Domville's Trust*, in *re*, 598.

See ANNUITY. TRUSTS.

Bequest of Promissory Note.]

See PROMISSORY NOTE.

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WINDING-UP ACTS.

Contributory.] A proprietor of shares bequeathed them to an unmarried lady, who subsequently married. Neither on the death of the testatrix, nor on the marriage of the legatee, were the regulations of the deed of settlement complied with. The court was of opinion that there was no sufficient evidence of the assent of the executor of the testatrix to the legacy, or that the directors of the company had approved of the legatee and her husband, or all of them, as proprietors or proprietor of the shares; and, therefore:—

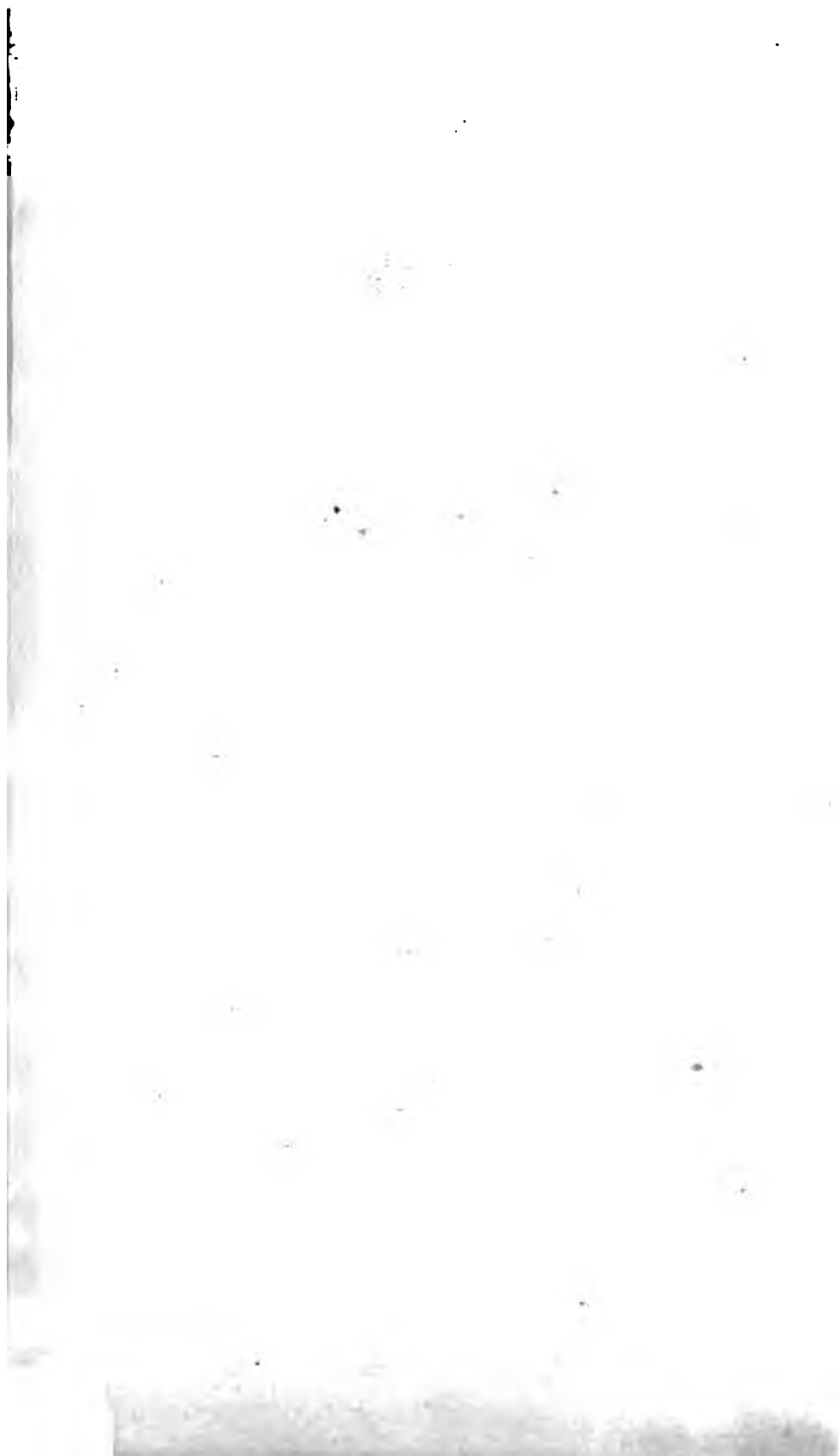
Held, overruling an order of one of the Vice-Chancellors, (by which he had reversed a decision of the Master,) that the legatees and her husband were not liable as contributories, and that the liability of the executor not having ceased, his name was properly placed on the list of contributories, without qualification. *Wood, ex parte*, 236.

See CONTRIBUTORY.

WITNESS.

Cross-Examination.] Terms on which a witness will be allowed to be examined and cross-examined, after having been already examined *de bene esse*, in anticipation of a trial in which the record had been withdrawn at the last assizes. *Reeves v. Hodson*, 327.





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